Supreme Court, U.S.
FILED
SEP 21 1993
OFFICE OF THE CLERK

93-453

No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,
Petitioners,
vs.
RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of Colorado
Case No. 93SA017

GALE A. NORTON*
Attorney General of Colorado
TIMOTHY M. TYMKOVICH
Solicitor General
JOHN DANIEL DAILEY
Deputy Attorney General
PAUL FARLEY
Deputy Attorney General
Colorado Department of Law
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
Telephone: (303) 866-4500

REX E. LEE
Special Assistant Attorney General
2480 Iroquois Drive
Provo, Utah 84604
Telephone: (801) 373-3342

ATTORNEYS FOR THE PETITIONERS

* Counsel of Record

QUESTION PRESENTED FOR REVIEW

Whether a popularly enacted state constitutional amendment precluding special state or local legal protections for homosexuals and bisexuals violates a fundamental right of identifiable, yet non-suspect groups to seek such special protections.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 6

I. THE COLORADO SUPREME COURT'S DECISION IS CONTRARY TO THIS COURT'S DECISIONS IN *HUNTER v. ERICKSON*, *JAMES v. VALTIERRA*, AND *WASHINGTON v. SEATTLE SCHOOL DISTRICT* 6

II. THE COLORADO SUPREME COURT'S DETERMINATION THAT SEXUAL ORIENTATION TRIGGERS HEIGHTENED PROTECTION UNDER THE EQUAL PROTECTION CLAUSE CONFLICTS WITH THE DECISIONS OF SEVERAL COURTS OF APPEALS. 11

III. THE DECISION BELOW PRESENTS AN ISSUE OF EXCEPTIONAL PUBLIC IMPORTANCE. 13

CONCLUSION 19

TABLE OF AUTHORITIES

CASES **PAGE**

Arthur v. City of Toledo, 782 F.2d 565 (6th Cir. 1986) 9

Beal v. Doe, 432 U.S. 438 (1977) 14

Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990) 12

Bernal v. Fainter, 467 U.S. 216, n.6 (1984) 18

Boscos's Club, Inc. v. City of Oklahoma City, 598 F. Supp. 583 (W.D. Okla. 1984) 18

Bowers v. Hardwick, 478 U.S. 186 (1986) 13, 19

Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992) 14

Citizens for Responsible Behavior, 2 Cal. Rptr. 2d 648 (Cal. App. 4th Dist. 1991) 9

City and County of Denver v. Buchanan, 714 P.2d 1352 (Colo. App. 1986) 15

City of Glendale v. Buchanan, 195 Colo. 267 P.2d 221 (1978) . . 15

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) . . . 18, 19

Gordon v. Lance, 403 U.S. 1 (1971) 5, 9

Gregory v. Ashcroft, 111 S. Ct. 2395 (1991) 15

TABLE OF AUTHORITIES

CASES **PAGE**

Harris v. McCrae, 448 U.S. 297 (1980) 14

High Tech Gays v. Defense Investigations Security Clearance Office, 895 F.2d 563, *reh'g denied*, 909 F.2d 375 (9th Cir. 1990) 12

Hill v. Stone, 421 U.S. 289 (1975) 10

Hunter v. Erickson, 393 U.S. 385 (1969) 5-11

Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) 5, 10

James v. Valtierra, 402 U.S. 137 (1971) 6-9, 11

Kramer v. Union Free School Dist., 395 U.S. 621 (1969) . 5, 9, 10

Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971) 9

Maher v. Roe, 432 U.S. 464 (1977) 14

Meyer v. Grant, 486 U.S. 414 (1988) 18

Mrazek v. Suffolk County Bd. of Elections, 630 F.2d 890 (2d Cir. 1980) 10

National Gay Task force v. Board of Educ., 729 F.2d 1270, 1273 (10th Cir. 1988) 12

TABLE OF AUTHORITIES

CASES **PAGE**

Organization for a Better Austin v. Keefe, 402 U.S. 415, n.1 (1971) 18

Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987) 12

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 18

Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991) 12

Reynolds v. Sims, 377 U.S 533 (1964) 5, 9, 10

Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463 (1979) 11

Steffan v. Cheney, 780 F. Supp. 1 (D. D.C. 1991) 12

Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975) 9

Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985) 18

Washington v. Seattle School Dist. No.1, 458 U.S. 457 (1982) 6-11, 16

Williams v. Rhodes, 393 U.S. 23 (1968) 5, 10

Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990) 12, 13

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS **PAGE**

Colo. Const. art. IV, § 1 14

Colo. Const. art. V, § 3 14

Colo. Const. art. V, § 50 14

Colo. Const. art. XIV, § 3 15

Colo. Const. art. XVIII, § 9(a) 14

Colo. Const. art. XVIII, § 9 15

Colo. Const. art. XX, § 1 15

Colo. Const. art. XX, § 7 14

U.S. Const. art. VI 14

STATUTES

28 U.S.C. § 1257 2

Act of Apr. 2, 1993, 1993 Minn. Sess. Law Serv. 81 (West) (amending Minn. Stat. 1992 § 363) 16

Cal. Civ. Code § 51.7 (West 1982) 16

TABLE OF AUTHORITIES

STATUTES **PAGE**

Cal. Labor Code § 1102.1 (West 1989) 16

Conn. Gen. Stat. Ann. § 46a-81a (West 1986) 16

D.C. Code Ann. § 1-2502 (1991) 16

Haw. Rev. Stat. § 378-1 (1992 Supp.) 16

Mass. Gen. L. ch. 1518 § 3 (1982) 16

N.J. Stat. Ann. § 10:5-5 (West 1993) 16

Vt. Stat. Ann. tit. 1, § 143 (1985), tit. 9, § 4503 (1984), tit. 21, § 495 (1987) 16

Wis. Stat. Ann. § 101.22 (West 1988) 16

OTHER AUTHORITIES

Anti-Gay-Rights Drive Spreads, The Denver Post, Mar. 5, 1993 16

Council of State Governments, *The Book of the States* (1990) . . . 15

Legislative Council of the Colorado General Assembly, *An Analysis of 1992 Ballot Proposals*, Research Publ. No. 369 (1992) . . . 3

TABLE OF AUTHORITIES

OTHER AUTHORITIES **PAGE**

Note, *The Hunter Doctrine: An Equal Protection Theory That Threatens Democracy*, 38 Vand. L. Rev. 397 (1985) . 9, 10

Oregon Lawmakers Ban Local Votes on Gay Bias, N.Y. Times, July 30, 1993 17

No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,
Petitioners,
vs.
RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of Colorado
Case No. 93SA017

The Governor of the State of Colorado, the Attorney General of the State of Colorado, and the State of Colorado petition that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Colorado in this case.

OPINIONS BELOW

The opinion of the Colorado Supreme Court (Pet. App. A) is reported at 854 P.2d 1270 (Colo. 1993). The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on July 19, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257, and is discussed *infra* at pp. 17-19.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article II, § 30b of the Colorado Constitution provides:

> NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN, OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have any claim of minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

STATEMENT OF THE CASE

In March 1992, the requisite number of qualified voters submitted to the Colorado Secretary of State a petition to place before the electorate a proposal to add a new section to article II of the Colorado Constitution. The proposed amendment, known popularly as "Amendment 2," was entitled "No Protected Status Based On Homosexual, Lesbian, or Bisexual Orientation."

At the time Amendment 2 was proposed, a number of governmental entities in Colorado had granted special rights or protections to homosexuals and bisexuals: three home rule cities (Denver, Boulder, and Aspen) had ordinances prohibiting discrimination based on sexual orientation in jobs, housing, and public accommodations; the Colorado Civil Rights Commission had voted to recommend that the General Assembly extend the State's civil rights act to ban discrimination based upon sexual orientation; the Governor had issued an executive order prohibiting job discrimination for state classified employees based on sexual orientation; at least two state colleges had policies prohibiting discrimination based on sexual orientation; and the Colorado General Assembly had enacted a statute prohibiting health insurance companies from determining insurability based on one's sexual orientation.[1]

On November 3, 1992, Amendment 2 passed by a margin of 813,966 to 710,151 (53.4% to 46.6%). On November 12, 1992, Respondents -- various individuals and governmental plaintiffs -- instituted an action in a Colorado state district court to have Amendment 2 declared unconstitutional on its face, and to enjoin its enforcement. Respondents claimed that the amendment violated

---

[1]Legislative Council of the Colorado General Assembly, *An Analysis of 1992 Ballot Proposals*, Research Publ. No. 369 (1992) attached hereto as Pet. App. C.

several provisions of the state and federal constitutions, including the Equal Protection Clause of the Fourteenth Amendment.

On December 23, 1992 and December 28, 1992, respondents filed motions to preliminarily enjoin the enforcement of Amendment 2, which was to go into effect on or before January 15, 1993. After a hearing, the district court ruled on January 15, 1993, that Amendment 2 was likely unconstitutional, because it infringed upon a fundamental right and likely could not be justified by a compelling state interest. Pet. App. at B-21. Consequently, the district court enjoined Petitioners Romer and Norton from enforcing Amendment 2, pending the outcome of a trial on the merits.

On appeal, the Colorado Supreme Court affirmed the injunction. It first undertook *de novo* review of what it characterized as a purely legal issue of whether Amendment 2 violated a fundamental right guaranteed by the Equal Protection Clause. The court determined that Amendment 2 repealed existing special protections for homosexuals and bisexuals, and prohibited "any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures." Pet. App. at A-28. The court held that Amendment 2 did infringe a fundamental right guaranteed by the Equal Protection Clause of the Fourteenth Amendment and, thus, held that the Amendment must satisfy strict judicial scrutiny, *viz.*, it must directly advance a compelling state interest in order to be enforceable. *Id.* at A-31.

The essence of this "fundamental right," the court determined, was that "laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process, absent a compelling state interest." *Id.* at A-16. The right was infringed here, the court concluded, because Amendment 2 "bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs, insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on

their sexual orientation." *Id.* at A-29. The court purported not to rest its decision upon any conclusion that sexual orientation established a "suspect class" for purposes of equal protection analysis. *Id.* at A-8.

The court found this "right" after examining separate lines of authority concerning the States' ability to restructure political processes (*e.g.*, *Hunter v. Erickson*, 393 U.S. 385 (1969)), the right to vote, (*e.g.*, *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Reynolds v. Sims*, 377 U.S 533 (1964); *Gordon v. Lance*, 403 U.S. 1 (1971)), and candidate eligibility (*e.g.*, *Williams v. Rhodes*, 393 U.S. 23 (1968); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979)). The court thus affirmed the injunction and placed the state constitutional amendment in abeyance, subject only to the State's ability to "prove" that Amendment 2 directly and least restrictively advances a compelling state interest.

In dissent, Justice William H. Erickson argued that the majority had blurred "fundamental rights" cases with "suspect class" cases, and selectively used language from each, to create a heretofore unknown federally-mandated group-based fundamental right. Justice Erickson found that this Court's decisions, as well as the analysis of constitutional scholars, refute the existence of a fundamental right of any independently identifiable group to participate equally in the political process. Rather, he said, this Court's cases support strict scrutiny review only where a suspect class is adversely affected by a restructuring of the political process. Pet. App. at A-62.

REASONS FOR GRANTING THE PETITION

I. THE COLORADO SUPREME COURT'S DECISION IS CONTRARY TO THIS COURT'S DECISIONS IN *HUNTER v. ERICKSON*, *JAMES v. VALTIERRA*, AND *WASHINGTON v. SEATTLE SCHOOL DISTRICT*

As the basis for its conclusion that "any identifiable group" possesses a fundamental right to seek enactment of local legislation benefitting it, the Colorado Supreme Court disavowed reliance upon sexual orientation as the basis for a "suspect class" and instead purported to apply a line of cases commencing with *Hunter* v. *Erickson*, 393 U.S. 385 (1969). This conclusion conflicts with *Hunter* and the cases of this Court that authoritatively construe it: Under those cases, the Equal Protection Clause prohibits only efforts to realign the political process in a manner designed to harm a suspect class. Decisions of other courts have also held that *Hunter* and related cases are limited in this manner.

In *Hunter*, this Court reviewed an amendment to a city charter which repealed a racial anti-discrimination ordinance, and required voter approval before that type of ordinance could be put into effect. The Court made quite clear that the amendment was struck down because the city council alone could no longer enact such measures on the behalf of racial minorities. Characterizing the amendment as placing "special burdens on racial minorities within the governmental process," 393 U.S. at 391, this Court observed:

> Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are 'constitutionally suspect' and subject to the 'most rigid scrutiny.' They 'bear a far heavier burden of justification' than other classifications.

Id. at 391-92 (citations omitted).

Two years later, this Court refused to extend *Hunter* to groups which did not qualify as suspect classes. *James v. Valtierra*, 402 U.S. 137 (1971), concerned the validity of a California constitutional measure prohibiting state public bodies from developing, constructing, or acquiring low income housing projects without prior approval by a majority vote in a city, town, or county referendum. A lower court had ruled, based on its reading of *Hunter*, that the California measure unconstitutionally discriminated against poor people in the exercise of their right to seek redress from governmental authorities. On appeal, however, this Court disagreed, finding that, unlike in *Hunter*,

> it cannot be said that California's Article XXXIV rests on 'distinctions based on race.' . . . The present case could be affirmed only by extending *Hunter*, and this we decline to do. [Respondents] suggest that the mandatory nature of the Article XXXIV referendum constitutes unconstitutional discrimination because it hampers persons desiring public housing from achieving their objective, when no such roadblock faces other groups seeking to influence other public decisions to their advantage. But, of course, a law-making procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably, a State would not be able to require referendums on any subject, unless referendums were required on all, because they would always disadvantage some group.

Id. at 141-42 (1971).

Eleven years after *Valtierra*, this Court invalidated a voter-initiated statute which removed the power of school boards to order busing to desegregate schools in *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982). However, this Court acknowledged that "the political majority may generally restructure the political process

to place obstacles in the path of everyone seeking to secure the benefits of governmental action." It is only "when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process" that a different analysis is required. *Id.* at 470 (emphasis in original). Indeed, the majority underscored that the core of this line of cases is:

> [W]hen the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice, the governmental action seriously 'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.' In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'

Id. at 486 (citations omitted).

Hunter, *Valtierra*, and *Seattle School District*, thus, establish no fundamental rights or other equal protection rights independent of those established by virtue of the existence of a suspect classification. Rather, these cases call for strict scrutiny *only* when the political process has been restructured to place unusual burdens upon racial groups or other suspect classes -- "those groups . . . relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Seattle School District*, 458 U.S. at 486; *see also Valtierra*, 402 U.S. at 141-42. In conflict with the Colorado Supreme Court, various

other courts have confirmed that *Hunter*, *Valtierra*, and *Seattle School District* are confined in this manner.[2]

The Colorado Supreme Court claimed support for its decision from cases such as *Reynolds v. Sims*, 377 U.S. 533 (1964), *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969), and *Gordon v. Lance*, 403 U.S. 1 (1971). Each of these cases concerns the fundamental right to vote, not the "right" identified by the court below. *Reynolds v. Sims* stands for the proposition that the right to vote, read together with the Equal Protection Clause, requires the representation of like numbers of people, rather than geographic areas. *Kramer v. Union Free School Dist.* held that the right to vote may not be voided on the basis of whether one is a property owner or a parent. *Gordon v. Lance* upheld a supermajoritarian vote requirement at all levels of government, with respect to a particular issue (bonded indebtedness), because no "independently identifiable group" was adversely affected.

At root, these cases hold that the *right to vote* is abridged if one voter cannot exercise it as fully as other voters. These cases do not

---

[2]*See, e.g., Tyler v. Vickery*, 517 F.2d 1089, 1099 (5th Cir. 1975) (characterizing *Hunter* as striking "down a city charter amendment requiring voter approval of certain antidiscrimination ordinances on the ground that the amendment created a classification based on race"); *Lee v. Nyquist*, 318 F. Supp. 710, 718-20 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971) ("The principle of *Hunter* is that the state creates an 'explicitly racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area."); *cf. Arthur v. City of Toledo*, 782 F.2d 565, 571-74 (6th Cir. 1986) (*Hunter*, *Valtierra*, and *Seattle School Dist.* reflect prohibition of racial discrimination); *Citizens for Responsible Behavior*, 2 Cal. Rptr. 2d 648, 655 (Cal. App. 4th Dist. 1991) ("*Hunter* was a 'strict scrutiny' case in which the law invalidly classified the affected parties on the basis of traditionally suspect characteristics"). *See also* Note, *The Hunter Doctrine: An Equal Protection Theory That Threatens Democracy*, 38 Vand. L. Rev. 397, 421-26 (1985) (hereafter, "*Hunter Doctrine*") (*Hunter* doctrine limited to state action embodying a racial classification).

concern the *range of issues* that all voters may or may not vote upon. They certainly do not implicate a restructuring of the overall political process. Amendment 2 does not, after all, present a case where homosexuals and bisexuals have been denied the right to vote in upcoming general elections,[3] or where reapportionment or other state action has diluted the value of their individual votes;[4] likewise, no supermajoritarian requirement has been imposed upon homosexuals and bisexuals.

The court below further attempted to justify its ruling on the basis of this Court's decisions in *Williams v. Rhodes*, 393 U.S. 23 (1968), and *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979). However, these cases are wholly inapposite. In *Williams*, this Court held that a complex state statutory structure violated the rights to vote and association, because it had the effect of excluding from the ballot all but the candidates of the two major political parties. In *Illinois State Bd. of Elections*, this Court reviewed a scheme which placed higher burdens on new or third-party candidates for local offices than for statewide offices. As in *Williams*, this Court struck down the scheme because it placed an unacceptable burden upon the rights to vote and associate. Neither

---

[3]"By definition, however, a referendum, affords all similarly situated people an equal opportunity to vote. The referendum requirements in *Hunter* and *Seattle School Dist.* did not threaten to disenfranchise certain voters by placing special procedural burdens on their right to vote." *Hunter Doctrine*, 30 Vand. L. Rev. at 429. *Compare Hill v. Stone*, 421 U.S. 289 (1975) (invalidating provision limiting voters in city bond elections to persons who have listed property for taxation); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (invalidating provision limiting voters in school district elections to persons owning or leasing taxable real property, or parents or custodians of children enrolled in schools).

[4]*See Reynolds v. Sims*, 377 U.S. 533 (1964). *See also Mrazek v. Suffolk County Bd. of Elections*, 630 F.2d 890, 898 (2d Cir. 1980) ("The one-person, one-vote doctrine requires no more, and does not create rights and privileges beyond the warranty of mathematical equivalency of votes").

case stands for anything more than that the Constitution will not permit burdens on access to the ballot which are designed to exclude challengers to the established parties.

Amendment 2, of course, presents no obstacles whatsoever to particular candidates or political parties. Indeed, homosexuals and bisexuals have the same access to the ballot, including the initiative process through which Amendment 2 was adopted, as all other Colorado citizens. Rather than burdening any person's rights to vote or associate, all Amendment 2 does is limit state and local governments' ability to act with respect to a certain issue. Neither the fundamental right to vote, nor that to petition government, encompasses a right to require a particular governmental entity to entertain matters which are beyond its authority to address. *See Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 464-65 (1979).

Moreover, even if the right to vote cases could be said to support respondents' position, that would merely reinforce the need to resolve precisely how *Hunter* should be interpreted. However, in light of *Valtierra* and *Seattle School Dist.*, it is manifest that the Colorado Supreme Court's extension of *Hunter* is foreclosed by the decisions of this Court, and also conflicts with decisions of other courts. Accordingly, review by this Court of the issue presented is clearly warranted.

II. THE COLORADO SUPREME COURT'S DETERMINATION THAT SEXUAL ORIENTATION TRIGGERS HEIGHTENED PROTECTION UNDER THE EQUAL PROTECTION CLAUSE CONFLICTS WITH THE DECISIONS OF SEVERAL COURTS OF APPEALS.

Under the Colorado Supreme Court's decision, sexual orientation defines an "identifiable group" that warrants special constitutional protection under the Fourteenth Amendment. The

Colorado Supreme Court acknowledged that other courts have held that sexual orientation does not define a "suspect class" for purposes of the Equal Protection Clause, and the court purported not to rely directly upon that analysis. Pet. App. at A-9. Even so, without using the term "suspect class," the state court created equivalent protection and achieved the same result.

It held that Amendment 2 triggered strict scrutiny under the Equal Protection Clause "because it bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs, insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation." *id.* at A-29. It is inconceivable that the state court would extend equivalent protection to "identifiable groups" defined by characteristics such as income, occupation, property ownership, residence, or receipt of services, and the opinion does not hint that statewide regulation that demanded uniformity on those bases would be subjected to anything but rationality review.

In contrast to the Colorado Supreme Court's determination, every federal court of appeals that has considered the issue has concluded that some form of rational relationship review applies to governmental measures that draw distinctions based upon sexual orientation. *See, e.g., High Tech Gays v. Defense Investigations Security Clearance Office*, 895 F.2d 563, *reh'g denied*, 909 F.2d 375 (9th Cir. 1990) (rejecting strict scrutiny); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987); *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1988), *aff'd*, 470 U.S. 903 (1985); *see also Steffan v. Cheney*, 780 F. Supp. 1 (D. D.C. 1991). There is, however, continuing dispute within the Circuits regarding the proper standard of review under that general rubric. *See Pruitt v. Cheney*, 963 F.2d 1160, 1165-66 (9th Cir. 1991) (rejecting position of other circuits, and subjecting government classification based upon sexual

orientation to "'active' rational basis review" that requires scrutiny of record support for challenged classification).

In addition, the Colorado Supreme Court's extension of heightened protection based upon sexual orientation conflicts with this Court's ruling in *Bowers v. Hardwick*, 478 U.S. 186 (1986). There, this Court upheld, on a showing of only a rational basis, a statute criminalizing homosexual activity. If homosexual activity may be criminalized outright, it is assuredly nonsensical to say that those professing a desire to engage in such activity cannot be denied special protections in the absence of a compelling interest. *Cf. Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("After *Hardwick*, it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm"). Further review is, therefore, warranted to resolve these conflicts regarding the appropriate standard of review to be applied to governmental classifications predicated upon sexual orientation.

III. THE DECISION BELOW PRESENTS AN ISSUE OF EXCEPTIONAL PUBLIC IMPORTANCE.

By finding an equal protection right of any "independently identifiable group" to pursue beneficial legislation at the local level, the Colorado Supreme Court has created widespread uncertainty and has potentially injected the judiciary into a broad range of issues heretofore reserved to state legislatures or to Congress.

Because the right identified by the Colorado Supreme Court is nearly unqualified, it will provide the basis to attack a wide range of routine federal and state legislation. For example, a vast array of federal tax, regulatory, and social legislation affects groups that are "independently identifiable" based upon citizens' income, occupation, residence, health, age, or any number of other factors. State regulation that might provide greater benefits or protections to any of these groups is pre-empted if in direct conflict with such federal

legislation or if state law interferes with the goals and operation of federal law. U.S. Const. art. VI. Under the Colorado Supreme Court's reasoning, however, every such assertion of pre-emption may be challenged by a contrary constitutional claim that the Equal Protection Clause guarantees the right of the affected group to seek additional benefits at the state or local level.[5]

Similarly, every state measure designed to achieve uniformity or to allocate benefits and burdens may now be challenged on federal constitutional grounds as interfering with an identifiable group's ability to secure benefits from local governments. Colorado, like other States, has, through legislation, imposed tax, safety, environmental, and other requirements upon "independently identifiable" groups. The Colorado Constitution, likewise, burdens identifiable groups that desire abortion funding,[6] the re-election of incumbent officials,[7] reorganization of certain school districts,[8]

---

[5]For example, smokers are an "identifible group" which, under the Colorado Supreme Court's theory, would be entitled to pursue a state cause of action, even though it would be otherwise pre-empted by federal law. *But cf. Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992).

[6]By virtue of Colo. Const. art. V, § 50, the State is prohibited from spending public funds to assist, financially or otherwise, in the inducement of abortion, except in very narrow circumstances. Abortion advocates must seek a constitutional amendment to fund this particular medical procedure; advocates for any other medical procedure need only seek a statute. These types of provisions are patently constitutional. *See Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977); *Harris v. McCrae*, 448 U.S. 297 (1980).

[7]Colo. Const. art. XVIII, § 9(a) limits the terms of state elected officials, thereby preventing the identifiable group of supporters of particular incumbents from voting for the candidate of their choice. *See also* Colo. Const. art. IV, § 1; *id.* art. V, § 3.

[8]Colo. Const. art. XX, § 7 establishes a single school district for the City and County of Denver. Although the residents of any other school district may divide or reorganize their district by obtaining a statute to that

certain municipal annexations,[9] and limited gaming.[10] These measures, as well as the allocation of power to make these determinations, are "intimately related to the process of democratic self-government" committed to the States. *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2402 (1991); *see also* U.S. Const. amend. X.[11] Colorado, like other States,

> permits persons who are dissatisfied at a local level to appeal to the state legislature or the people of the State for redress. It permits the people of a State to pre-empt local policies, and to formulate new programs and regulations. Such a process is inherent in the continue sovereignty of the States. This is our system. Anytime a State chooses to address a major issue some persons or groups may be disadvantaged. In a democratic system there are winners and losers. But there is no inherent unfairness in this and certainly no constitutional violation.

---

effect, residents of Denver must obtain a constitutional amendment.

[9]Colo. Const. art. XX, § 1 and art. XIV, § 3, prevent the City and County of Denver from annexing land in any manner other than as a county. The citizens of Denver bear a greater burden than citizens of other Colorado cities, but this presents no cognizable constitutional question. *Cf. City and County of Denver v. Buchanan*, 714 P.2d 1352 (Colo. App. 1986); *City of Glendale v. Buchanan*, 195 Colo. 267, 578 P.2d 221 (1978).

[10]Colo. Const. art. XVIII, § 9 allows limited gaming only in Central City, Black Hawk, and Cripple Creek. All other Colorado communities must obtain a constitutional amendment.

[11]Indeed, in every State in the country, the people themselves retain the power to approve or disapprove amendments to their respective constitutions. Council of State Governments, *The Book of the States* at 42-43 (1990).

Seattle School Dist. 458 U.S. at 496 (Powell, J., dissenting).[12] The Colorado Supreme Court's decision bars efforts to determine these matters at the state level and resurrects the "vested constitutional right to local decision-making" specifically rejected in *Seattle School Dist.*, 458 U.S. at 480 n.23.

Even if the Colorado Supreme Court's decision were or could be limited to determinations regarding rights based upon sexual orientation, it represents a dramatic and unwarranted interference in the political process that necessitates this Court's review. Citizens' groups in at least fourteen other States are considering sponsoring measures similar to Amendment 2.[13] In contrast, citizens or their representatives in eight States have enacted special protections for homosexuals and bisexuals at a statewide level.[14] Opponents of such

---

[12]It is important to note the Justice Powell was joined by three other Justices in dissenting from the majority's invalidation of a statewide referendum found to "impose substantial and unique burdens on racial minorities ...." *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 470 (1982). Surely, in the absence of any such burden, the people of a State are free to amend their constitution through democratic processes.

[13]Those States are Arizona, California, Florida, Georgia, Idaho, Iowa, Maine, Michigan, Minnesota, Missouri, Montana, Ohio, Oregon, and Washington. *See Anti-Gay-Rights Drive Spreads*, The Denver Post, Mar. 5, 1993, at 1.

[14]*See* Cal. Civ. Code § 51.7 (West 1982); Cal. Labor Code § 1102.1 (West 1989); Conn. Gen. Stat. Ann. § 46a-81a to 46a-81r (West 1986); Haw. Rev. Stat. §§ 378-1, 378-3 (1992 Supp.); Mass. Gen. L. ch. 1518 §§ 3, 4 (1982); Act of Apr. 2, 1993, 1993 Minn. Sess. Law Serv. 81 (West) (amending Minn. Stat. 1992 § 363); N.J. Stat. Ann. §§ 10:5-5, 10:5-12 (West 1993); Vt. Stat. Ann. tit. 1, § 143 (1985), tit. 9, §§ 4503-4504 (1984), tit. 21, § 495 (1987); Wis. Stat. Ann. §§ 101.22, 111.32 (West 1988). *See also* D.C. Code Ann. §§ 1-2502, 1-2503 (1991). Moreover, in Oregon, where a statewide anti-homosexual rights proposal was defeated last year, communities have attempted to enact local anti-homosexual rights measures. In marked contrast to the instant case, homosexual rights advocates are arguing there that new state legislation bars such measures,

special protections in those States obviously must first secure the repeal of the statewide measure before they can appeal to their local governments for action in their favor. Thus, whichever side wins the public policy debate at the statewide level, the losers face a greater burden with respect to their right to participate at the local level. Presumably, then, a statewide measure extending special protections to homosexuals and bisexuals would infringe upon the "fundamental right" identified by the Colorado Supreme Court. To rule otherwise would mean that only those favoring special protections could appeal to the state legislature or the people if they lost at the local level.

Rather than permitting the range of issues associated with sexuality to be widely debated and determined through the political process at a variety of levels, the Colorado Supreme Court has determined that the federal Constitution dictates the terms of the political debate, insulating it from the state legislature or the people themselves. Its decision strikes at the heart of voter sovereignty, because any distinction made by government in the establishment of its political structure becomes vulnerable to constitutional attack. Any individual voter whose cause is unsuccessful in a referendum could sue to overturn that referendum, simply because the majority imposed its will on a minority concern. As a result, public policy issues cannot be decisively settled; government is obliged to continually reconsider every policy choice.

The profound legal significance of the court's ruling below, and the widespread importance of the issues in this case, provide compelling reasons for the Court to resolve any doubts concerning the finality of the judgment in favor of permitting immediate review by this Court. The Court has adopted a pragmatic approach to determining the finality of judgments under 28 U.S.C. § 1257. It has

---

because "[t]he issue of discrimination based on sexual orientation is a statewide concern, and [opponents'] divide and conquer mentality will not be tolerated." *See Oregon Lawmakers Ban Local Votes on Gay Bias*, N.Y. Times, July 30, 1993, at A-10.

held decisions to be final "where, for one reason or another, the federal issue is conclusive or the outcome of further proceedings preordained. In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479 (1975).

In this case, the Colorado Supreme Court has, upon *de novo* review and without reliance upon any underlying factfinding, finally resolved the federal legal issue that will control the resolution of this litigation. "The most important component of any equal protection analysis is the determination of the appropriate level of scrutiny to be applied to the enactment."[15] Here, the Colorado Supreme Court determined that a federally guaranteed fundamental right was infringed upon and, thus, that Amendment 2 must be subjected to strict judicial scrutiny. The State's burden in this respect "is well-nigh insurmountable." *Meyer v. Grant*, 486 U.S. 414, 425 (1988). This is so because "[o]nly rarely are statutes sustained in the face of strict scrutiny. [S]trict scrutiny is strict in theory, but usually fatal in fact." *Bernal v. Fainter*, 467 U.S. 216, 219 n.6 (1984) (internal quotation omitted).

For this reason, this Court has often reviewed preliminary injunction orders including those in which the controlling federal issue has been decided by a state appellate court. *See, e.g., Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 n.1 (1971). *Cf. Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (appellate review of federal district court decree preliminarily enjoining enforcement of state statute); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (federal district court's preliminary injunction, founded upon conclusion that congressional act was likely to be unconstitutional, reviewable under 28 U.S.C. § 1252 as an order

---

[15] *Boscos's Club, Inc. v. City of Oklahoma City*, 598 F. Supp. 583, 589 (W.D. Okla. 1984).

"holding act of Congress unconstitutional"); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (review of federal circuit court's order finding state criminal sodomy statute violated fundamental right and remanding for trial on issue of compelling interest).

Given the controlling nature of the Colorado Supreme Court's decision on the remainder of the case, the policy underlying the finality requirement in 28 U.S.C. § 1257 demands immediate, rather than delayed, review so as to "avoid 'the mischief of economic waste and delayed justice.'" *Cox Broadcasting Corp.*, 420 U.S. at 477-78.[16]

CONCLUSION

For the reasons stated herein, this Court should issue a Writ of Certiorari to review the judgment of the Colorado Supreme Court.

Respectfully submitted this 17th day of September, 1993.

GALE A. NORTON*
Attorney General of Colorado
TIMOTHY M. TYMKOVICH
Solicitor General
JOHN DANIEL DAILEY
Deputy Attorney General
PAUL FARLEY
Deputy Attorney General
Colorado Department of Law
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
Telephone: (303) 866-4500

REX E. LEE
Special Assistant Attorney General
2480 Iroquois Drive
Provo, Utah 84604
Telephone: (801) 373-3342

ATTORNEYS FOR THE PETITIONERS

* Counsel of Record

---

[16]Although the State is preparing for trial on the compelling state interest issues, the public cost of this undertaking is enormous and wholly unwarranted.

APPENDIX A

SUPREME COURT, STATE OF COLORADO
No. 93SA17 JULY 19, 1993

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN,
JANE DOE, MARTINA NAVRATILOVA, BRET TANBERG, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2,
THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, AND THE CITY COUNCIL OF ASPEN,

Plaintiffs-Appellees,

v.

ROY ROMER, as Governor of the State of Colorado,
GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Defendants-Appellants.

Appeal from the District Court, City and County of Denver
Honorable H. JEFFREY BAYLESS, Judge

EN BANC ORDER AFFIRMED

CHIEF JUSTICE ROVIRA delivered the Opinion of the Court.
JUSTICE ERICKSON dissents.

Defendants, Roy Romer, Governor of the State of Colorado, Gale A. Norton, Attorney General of the State of Colorado, and the State of Colorado (referred to collectively as "defendants") appeal the trial court's entry of a preliminary injunction enjoining them from enforcing a voter-initiated amendment to the Colorado Constitution ("Amendment 2"). We affirm.

I

In May 1992, the requisite number of qualified voters submitted petitions to the secretary of state to present to the electorate a new section 30 to article II of the Colorado Constitution. The proposed constitutional amendment was put to the voters as Amendment 2 on November 3, 1992, and passed by a margin of 813,966 to 710,151 (53.4% to 46.6%).[1] The secretary of state certified the results on December 16, 1992, as required by article V, section 1, of the state constitution.

---

[1] Art. II, § 1, of the Colorado Constitution proclaims that "[a]ll political power is vested in and derived from the people; all government of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." Art. II, § 2, provides that "[t]he people of this state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided, such change be not repugnant to the constitution of the United States."

Amendment 2 provides:

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

On November 12, 1992, Richard G. Evans, along with eight other persons ("individual plaintiffs"), and the Boulder Valley School District RE-2, the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen ("governmental plaintiffs") (referred to collectively as "plaintiffs") filed suit in Denver District Court to enjoin the enforcement of Amendment 2 claiming that the amendment is unconstitutional. This contention was premised on several state and federal constitutional provisions.[2]

---

[2] The individual plaintiffs claim that Amendment 2 violates their right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution because it fails to rationally advance a legitimate governmental interest and because it places unique burdens on plaintiffs' ability to participate equally in the political process. They also challenged the amendment on numerous First Amendment grounds including that it violates their right to petition their government for a redress of grievances; that it violates their rights to free expression and association; that it violates the constitutional prohibition against the establishment of religion; and that it is unconstitutionally vague. They also alleged that the initiative process by which Amendment 2 was passed violates the Guarantee Clause of Article

After plaintiffs' request for an expedited hearing on the merits was rejected, they filed a motion seeking to preliminarily enjoin the enforcement of Amendment 2 which was to go into effect on or before January 15, 1993.[3] In support of this motion, plaintiffs argued that Amendment 2 deprives them of the First Amendment right of free expression and their Fourteenth Amendment right to equal protection of the laws. The First Amendment claim was based on the contention that Amendment 2 eliminates all potential means of redress for private retaliation or discrimination against gay men, lesbians, and bisexuals. Accordingly, the First Amendment requires the government to demonstrate a compelling justification for exposing those who engage in expressive conduct to increased risk. This burden, plaintiffs maintained, could not be met by the state. The trial court neither addressed nor relied on this argument in rendering its decision.

IV, Section 4, of the United States Constitution. Lastly, the individual plaintiffs allege that Amendment 2 prohibits state courts from enforcing statutes, regulations, ordinances, and policies concerning discrimination based on sexual orientation and therefore, violates the Supremacy and Due Process Clauses of the Federal Constitution and art. II, § 6, of the Colorado Constitution.

Two of the governmental plaintiffs urge that Amendment 2 be construed so as not to affect their home rule powers. The Boulder Valley School District RE-2 asserts that Amendment 2 may violate local control over educational policies protected by art. IX, § 15, of the Colorado Constitution. All of the governmental plaintiffs claim that the amendment subjects them to potential liability under the Supremacy Clause of the Federal Constitution.

[3] Art. V, § 1, of the Colorado Constitution provides that state constitutional amendments passed via the initiative process "shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed."

Plaintiffs presented two separate arguments under the Equal Protection Clause. First, that Amendment 2 violates their right to equal protection of the laws insofar as it denies gay men, lesbians, and bisexuals the opportunity to participate equally in the political process. Second, that Amendment 2 lacks a rational basis for the burdens it imposes on gay men, lesbians, and bisexuals.

The trial court conducted an evidentiary hearing to consider the motion. Following its conclusion, the court issued a temporary restraining order. The next day, the trial court held that plaintiffs had met their burden under the six-part test of *Rathke v. MacFarlane*, 648 P.2d 648, 653-54 (Colo. 1982), which sets forth the applicable standard for the issuance of a preliminary injunction and accordingly, granted plaintiffs' motion barring the enforcement of Amendment 2 pending the outcome of a trial on the merits.[4]

More specifically (and of central importance to this appeal) the trial court concluded that plaintiffs had met the threshold requirement of *Rathke* by demonstrating that enjoining the enforcement of Amendment 2 was necessary to protect their right to equal protection of the laws under the United States Constitution. The court reached this conclusion by reasoning that Amendment 2 "may burden fundamental rights of an identifiable group." The

---

[4] Under *Rathke*, before a trial court may issue a preliminary injunction, "the moving party must establish, as a threshold requirement, a clear showing that injunctive relief is necessary to protect existing . . . fundamental constitutional rights." *Rathke*, 648 P.2d at 653. If this threshold requirement is met, the trial court must find that the moving party has demonstrated: a reasonable probability of success on the merits; a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; that there is no plain, speedy, and adequate remedy at law; that the granting of a preliminary injunction will not disserve the public interest; that the balance of equities favors the injunction; and that the injunction will preserve the status quo pending a trial on the merits. *Id.* at 653-54.

fundamental right, the court went on, was "the right not to have the State endorse and give effect to private biases."[5]

The trial court then determined that because Amendment 2 may burden a fundamental constitutional right, its constitutionality must be assessed by reference to the "strict scrutiny" standard of review. The court concluded that under this standard, plaintiffs had shown to a reasonable probability that Amendment 2 would be demonstrated to be unconstitutional beyond a reasonable doubt at a trial on the merits. *See Bollier v. People*, 635 P.2d 543, 545 (Colo. 1981) (statutes are presumed constitutional until and unless the contrary can be shown beyond a reasonable doubt).[6]

Defendants appealed pursuant to C.A.R. 1(a)(3), and we granted review. The basis of defendants' challenge to the preliminary injunction pertains only to the trial court's determination that the threshold requirement of *Rathke v. MacFarlane* had been met (*i.e.*, that injunctive relief is necessary to protect existing fundamental constitutional rights). Accordingly, the gravamen of defendants' allegation of error is their contention that the trial court "did not base its decision on any direct precedent," but rather "extrapolated from several federal court decisions" the right identified and allegedly infringed by Amendment 2. Moreover, defendants argue, there is no

---

[5] The trial court cited *Palmore v. Sidoti*, 466 U.S. 429 (1984) and *Reitman v. Mulkey*, 387 U.S. 369 (1967), as the primary support for this conclusion. The court quoted the Supreme Court's statement in *Palmore* that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect," *Palmore*, 466 U.S. at 433, and stated that *Reitman* stood for the proposition that it was unconstitutional to take "private discrimination and . . . [give] state support to it."

[6] We note that this presumption is all the more forceful in the context of a constitutional amendment. This is the case not only because here we deal with a constitutional provision as opposed to a statute, but in recognition of the broad powers which our state constitution places in the people. *See supra* note 1.

applicable legal precedent or established right under the Equal Protection Clause of the United States Constitution which Amendment 2 can be shown to infringe upon. Defendants conclude, therefore, that "the lower court's order was fundamentally flawed, and cannot be sustained."

Plaintiffs have presented to this court the same equal protection arguments that were made to, but not relied on by, the trial court. They do not urge that we base our decision on the precise right identified and relied on by the trial court in rendering its decision. To the contrary, they have argued to this court that the right identified by the trial court, when "read in light of the arguments actually presented to [it] . . . is best construed to mean that Amendment 2 violates the plaintiffs' fundamental right of political participation . . . ." In short, plaintiffs urge us to rely only on the equal protection arguments which they have relied on, and that the trial court's ruling should be construed to have done the same.

Before turning to the merits, we first set forth the applicable standard of review which governs our decision.

II

"The grant or denial of a preliminary injunction is a decision which lies within the sound discretion of the trial court." *Rathke*, 648 P.2d at 653. Consequently, an appellate court reviewing the issuance of a preliminary injunction will usually do so with great deference to the conclusion reached by the lower court. Only if the lower court's ruling was manifestly unreasonable, arbitrary, or unfair will an appellate court ordinarily substitute its judgment for that of the lower court. *People v. Milton*, 732 P.2d 1199, 1207 (Colo. 1987). Where the issue under review on appeal concerns only legal, as opposed to factual, questions however, the lower court's judgment is subject to independent review on appeal. *See Bloomer v. Board of County Comm'rs of Boulder County*, 799 P.2d 942, 944 (Colo. 1990)

(appellate courts need not defer to trial courts when reviewing questions of law).

The question before us is whether the trial court properly determined that the threshold requirement of *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1987), had been met by plaintiffs. Since that requirement pertains only to whether an existing constitutional right is infringed by Amendment 2, the question we review is strictly a question of law. *Lafferty v. Cook*, 949 F.2d 1546, 1550 (10th Cir. 1991) (constitutional standard is a question of law subject to *de novo* review on appeal), *cert. denied*, 112 S. Ct. 1942 (1992). Consequently, we independently review the question of whether Amendment 2 has been shown to violate an existing constitutional right.[7]

III

It is important to stress at the outset that the Equal Protection Clause of the United States Constitution applies to all citizens, and not simply those who are members of traditionally "suspect" classes such as racial or ethnic minorities. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). That gay men, lesbians, and bisexuals have not been found to constitute a suspect class, *see, e.g., High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (homosexuals neither a suspect nor quasi-suspect

---

[7] It is important to note in this context that the parties agree that in reviewing the order of the trial court, we are not limited to assessing only the right identified and relied on by the trial court in reaching its conclusion. Rather, a party "may defend the judgment of the trial court . . . on any ground supported by the record, so long as the party's rights are not increased under the judgment." *Farmer's Group, Inc. v. Williams*, 805 P.2d 419, 428 (Colo. 1991). As noted above, the plaintiffs have presented the same arguments to this court as those made to, but not relied on, by the trial court.

class); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (same), *cert. denied sub nom. Ben-Shalom v. Stone*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same), *cert. denied*, 494 U.S. 1003 (1990), and that plaintiffs do not claim that they constitute such a class do not render the Equal Protection Clause inapplicable to them.

It is well settled that there are three standards which may be applicable in reviewing an equal protection challenge: strict scrutiny, intermediate scrutiny, and rational basis review. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440-41 (1985). The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). "When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *City of Cleburne*, 473 U.S. at 440 (citations omitted).

Strict scrutiny review -- the most exacting standard of review under the Equal Protection Clause -- is reserved for statutes or state constitutional amendments that discriminate against members of traditionally suspect classes, *see, e.g., Graham v. Richardson*, 403 U.S. 365, 372 (1971) (alienage); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (race); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (national ancestry and ethnic origin), or infringe on any fundamental constitutional right, *City of Cleburne*, 473 U.S. at 440. Laws that are subject to strict scrutiny review will be sustained only if they are supported by a compelling state interest and narrowly drawn to achieve that interest in the least restrictive manner possible. *Plyler v. Doe*, 457 U.S. 202, 217 (1982).

Intermediate review, which requires a showing that the law in question is substantially related to a sufficiently important governmental interest, *Mississippi Univ. for Women v. Hogan*, 458

U.S. 718, 724 (1982), has been applied in the context of laws which draw distinctions based on gender, *id.* at 723-24, and illegitimacy, *Lalli v. Lalli,* 439 U.S. 259, 265 (1978), but not to those laws which create differential treatment based on age, *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 313 (1976).

Thus, in reviewing the trial court's determination that the plaintiffs carried their burden of establishing the threshold requirement of *Rathke v. MacFarlane,* 648 P.2d 648 (Colo. 1982), we first must determine which standard applies and second, whether Amendment 2 can be shown, under that standard, and to a reasonable degree of probability, to violate the guarantee of equal protection of the laws.

A

The right of citizens to participate in the process of government is a core democratic value which has been recognized from the very inception of our Republic up to the present time. *See* John Hart Ely, *Democracy and Distrust* 87 (1980) (the Constitution "is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, with . . . process writ large -- with ensuring broad participation in the processes and distributions of government"); Note, *Developments in the Law: Elections,* 88 Harv. L. Rev. 1111, 1114 (1975) ("no institution is more central to the United States' system of representative democracy than the election").[8]

---

[8] Indeed, the significance of political participation is evidenced by the fact that nearly half the amendments to the Constitution adopted since 1791 have concerned the franchise and election procedures. *See* U.S. Const. amends. XII (prescribing the method of electing the President and Vice President), XV (prohibiting the denial of the franchise on the basis of race, color, or previous condition of servitude), XVII (providing for the right to vote directly for United States Senators), XIX (extending the franchise to

BEST AVAILABLE COPY

The value placed on the ability of individuals to participate in the political process has manifested itself in numerous equal protection cases decided by the Supreme Court over the last thirty years. These include the reapportionment cases, *see, e.g., Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964), cases concerning minority party rights, *see, e.g., Williams v. Rhodes*, 393 U.S. 23 (1968), cases involving direct restrictions on the exercise of the franchise, *see, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), and cases involving attempts to limit the ability of certain groups to have desired legislation implemented through the normal political processes, *see, e.g., Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Gordon v. Lance*, 403 U.S. 1 (1971); and *Hunter v. Erickson*, 393 U.S. 385 (1969). When considered together, these cases demonstrate that the Equal Protection Clause guarantees the fundamental right to participate equally in the political process and that any attempt to infringe on an independently identifiable group's ability to exercise that right is subject to strict judicial scrutiny.[9] *See*

---

women), XXIII (extending the franchise to residents of the District of Columbia), XXIV (abolishing the poll tax), XXVI (extending the franchise to 18-year-olds).

[9] Strict judicial scrutiny is warranted when participatory rights are infringed not only because a *fundamental* right is at stake, *see Kramer*, 395 U.S. at 626-29, but also because

> [t]he presumption of constitutionality and the approval given 'rational' classifications in other types of enactments[] are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.

Dunn v. Blumstein, 405 U.S. at 336 ("In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."). *See also*, Laurence H. Tribe, *American Constitutional Law* 1062 (2d ed. 1988) ("At their core, all voting-related rights are rights to participate in [the] process [of representative government], and the import of the process for our system of government freights them with their indisputable moment.").

The Supreme Court has consistently struck down legislation which establishes preconditions on the exercise of the franchise. These cases, generally speaking, are the types which most clearly violate the guarantee of equal protection because the legislation under review has the effect of directly "[f]encing out," *Carrington v. Rash*, 380 U.S. 89, 94 (1965), certain classes of voters. Thus, the Court has held that the requirement that voters pay a poll tax, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), be civilians, *Carrington*, or have property or children, *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969), before they can exercise the right to vote runs afoul of the Equal Protection Clause. In reviewing this sort of legislative restriction on the franchise, the Court in *Kramer* expressed the standard of review and rationale for applying that standard in the following terms:

> Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental

---

Id. at 628. *See also Reynolds v. Sims*, 377 U.S. 533, 565 (1964). That is, the ordinary assumption which informs judicial review of legislation that "even improvident decisions will eventually be rectified by the democratic process[] and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted," *Vance v. Bradley*, 440 U.S. 93, 97 (1979), is rendered inapplicable when participatory rights are at issue.

> affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.

Kramer, 395 U.S. at 626-27.

As *Kramer* clearly demonstrates, the danger presented by such restrictive legislation is that it may deny "any effective voice in the governmental affairs which substantially affect their lives." *Id.* at 627. Thus, to the extent that legislation impairs a group's ability to effectively participate (which is not to be confused with successful participation) in the process by which government operates, close judicial scrutiny is necessitated.

This same emphasis on the value of equal participation emerges from a second group of cases which addresses the issue of reapportionment. In *Reynolds v. Sims*, 377 U.S. 533 (1964), for example, the Court acknowledged the importance of political participation and the need for the most searching standard of judicial scrutiny when any effort is made to limit participation, in recognition of the fact that "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* at 562. *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("even the most basic [rights], are illusory if the right to vote is undermined").

Unlike the situations presented in *Carrington*, *Kramer*, and *Harper*, however, the *Reynolds* Court was not confronted with legislation which set a precondition on the right to vote -- no individual or group was precluded, or even impeded, from voting. Rather, the question presented in *Reynolds* concerned the Equal Protection Clause's bearing on participatory effectiveness, *i.e.*, the

right to have one's vote be as meaningful as the votes of others.[10] Consequently, the Court's opinion in *Reynolds*, as well as in the other reapportionment cases, reflects the judgment that dilution in the effectiveness of certain voters' exercise of the franchise violates the guarantee of equal protection of the laws not simply because citizens are guaranteed the right to vote, but because that right must be preserved in a meaningful, effective manner. *Reynolds*, 377 U.S. at 565 ("each and every citizen has an inalienable right to full and effective participation in the political processes . . ."); *Board of Estimate of N.Y. v. Morris*, 489 U.S. 688, 693 (1989) (same). In short, equal protection requires that voters are able to exercise the right of franchise on an even footing with others. *See Gray v. Sanders*, 372 U.S. 368, 379-80 (1963) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.").

This principle has also been consistently relied on to strike down legislation in a third category of political participation cases -- the "candidate eligibility" cases. For example, the Supreme Court in *Williams v. Rhodes*, 393 U.S. 23 (1968), reviewed a series of Ohio statutes which "made it virtually impossible," for new political parties with widespread support, or an old party which enjoyed very little support, to be placed on the state ballot to choose electors pledged to particular candidates for the Presidency and Vice Presidency of the United States. *Id.* at 24. The Court observed that the state statutes placed significant burdens on "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," because

---

[10] In *Reynolds* the Supreme Court held that under the Equal Protection Clause, "the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.* at 579. The Court required "*substantial* equality" in recognition of the fact "that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement." *Id.* at 577.

a "vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot."[11] *Id.* at 31. The Court, again applying the strict scrutiny standard of review, concluded that only a compelling interest could justify "imposing such heavy burdens on the right to vote and to associate," and held that Ohio had failed to make such a showing. *Id.*

Similarly, in *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), Illinois statutes that discriminated against minority parties in local elections were held invalid under the Equal Protection Clause.[12] Applying the strict scrutiny standard, the Court invalidated the Illinois laws, holding that they unnecessarily restricted a constitutionally protected liberty, even while acknowledging that States have a legitimate interest in regulating the number of candidates that appear on a ballot.

The "precondition," reapportionment, and "candidate eligibility" cases are not dispositive of, or directly controlling on, our decision here, as Amendment 2 falls within none of those three categories of cases. Admittedly, those decisions addressed entirely distinct questions and constitutional problems from those presented here. Nevertheless, it would be erroneous to conclude that those decisions are entirely inapposite. In the course of invalidating the laws at issue in those cases, the Court consistently recognized the paramount importance of political participation in our system of

---

[11] The Court also held that the Ohio laws burdened "the right of individuals to associate for the advancement of political beliefs . . . ." *Rhodes*, 393 U.S. at 30.

[12] The Illinois statutes in question drew a distinction between the requisite number of signatures by eligible voters needed to place an independent candidate or a new party on the ballot at the state level from the number required to do so at the local level.

government,[13] and articulated the fundamental principle which guided its decision in those cases: The Equal Protection Clause guarantees the fundamental right to participate equally in the political process and thus, any attempt to infringe on that right must be subject to strict scrutiny and can be held constitutionally valid only if supported by a compelling state interest. This principle is what unifies the cases, in spite of the different factual and legal circumstances presented in each of them. Thus, while all three categories of cases are distinguishable from the present controversy, the common thread which unites them with one another, and with the case before us, is the principle that laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process absent a compelling state interest.

This principle has received its most explicit, and nuanced, articulation in yet another category of cases where the legislation at issue bore a much closer resemblance to the question presented by Amendment 2. This category of cases involves legislation which prevented the normal political institutions and processes from enacting particular legislation desired by an identifiable group of voters. In each case, the legislation was held to be violative of equal protection.

In *Hunter v. Erickson*, 393 U.S. 385 (1969), the Supreme Court struck down a charter amendment enacted by the voters of Akron, Ohio, which required any fair housing ordinance to be approved by the electorate, whereas other ordinances could be enacted by the city council. The Court held that the Akron amendment deprived minority groups of equal protection because it "place[d]

---

[13] Indeed, in *Illinois State Board of Elections*, 440 U.S. at 184, Justice Marshall, speaking for the Court, stated that "for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure." (citing *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

special burdens on racial minorities within the governmental process." *Hunter*, 393 U.S. at 391.

In reaching this conclusion, the Court recognized that the amendment was aimed at minority racial groups.[14] However, its opinion speaks to concerns which are broader than the repugnancy of racial discrimination alone. Thus, Justice White, speaking for the Court, noted that Akron was free to require a plebiscite as to "all its municipal legislation," but having chosen to do otherwise, he concluded that Akron could

> no more disadvantage *any particular group* by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.

Id. at 393 (emphasis added). It is significant to note that in support of this proposition, the Court did not rely on any precedent dealing with racial minorities in the context of voting but instead, cited *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Avery v. Midland*

---

[14] The *Hunter* Court noted that "[h]ere . . . there was an explicitly racial classification treating racial housing matters differently from other racial and housing matters," *Hunter*, 393 U.S. at 389, and observed that "[b]ut for those who sought protection against racial bias, the approval of the City Council was not enough." *Id.* at 390. The Court acknowledged, however, that "[i]t is true that the section draws no distinctions among racial and religious groups. Negroes and whites, Jews and Catholics are all subject to the same requirements if there is housing discrimination against them which they wish to end," *id.*, yet the Court also noted that the Akron amendment "nevertheless disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor." *Id.* at 391. Thus, the Court concluded that while the amendment was facially neutral, "the reality is that the law's impact falls on the minority." *Id.*

County, 390 U.S. 474 (1968), neither of which had anything to do with discrimination against racial, or any other traditionally suspect class of persons.

It is also notable that Justices Harlan and Stewart, both of whom dissented in *Reitman v. Mulkey*, 387 U.S. 369 (1967),[15] concurred separately to the majority opinion in *Hunter*. After articulating their disagreement with the *Reitman* Court, they observed that, unlike the California initiative, "the City of Akron [had] not attempted to allocate governmental power on the basis of any general principle." *Hunter*, 393 U.S. at 395 (Harlan, J., concurring).[16] To

---

[15] In *Reitman*, the Supreme Court invalidated an amendment to the California Constitution which had been passed by the initiative process. "Proposition 14" protected property owners' right to discriminate, on any grounds, in the sale or rental of their real property. The immediate effect of the amendment was to repeal existing state prohibitions on racial discrimination in housing and to prohibit the passage of similar measures in the future. *Reitman*, 387 U.S. at 374.

The Supreme Court held that Proposition 14 violated the Equal Protection Clause because it rendered "[t]he right to discriminate, including the right to discriminate on racial grounds . . . immune from legislative, executive, or judicial regulation at any level of the state government." *Id.* at 377.

[16] Justices Harlan and Stewart elaborated on the "general principle" theme as follows:

> The existence of a bicameral legislature or an executive veto may on occasion make it more difficult for minorities to achieve favorable legislation; nevertheless, they may not be attacked on equal protection grounds since they are founded on neutral principles. Similarly, the rule which makes it relatively difficult to amend a state constitution is commonly justified on the theory that constitutional provisions should be more thoroughly scrutinized and more soberly considered than are simple statutory enactments. Here, too, Negroes may stand to gain by the rule if a fair housing law is made part of the constitution, or they may

the contrary, the fair housing statute was passed with the "clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that [was] in their interest." *Id.* This, the concurring Justices concluded, violated the Equal Protection Clause.

Washington v. Seattle School District No. 1, 458 U.S. 457 (1982), presents another situation in which an issue important to a minority group was removed from consideration via the normal political process. In *Washington*, the Court considered the constitutionality of an initiative which attempted to prohibit local school districts from utilizing mandatory busing as a means of achieving desegregation.[17] Relying on *Hunter*, the Court held that the voters, in passing Initiative 350, had impermissibly interfered with the political process and unlawfully burdened the efforts of minority groups to secure public benefits. *Washington*, 458 U.S. at 467-70.

In reaching this conclusion, the Court embraced Justice Harlan's "neutral principles" formulation in *Hunter* and referred to it as the "simple but central principle," *id.* at 469, underlying the

---

> lose if the constitution adopts a position of strict neutrality on the question. But even if Negroes are obliged to undertake the arduous task of amending the state constitution, they are not thereby denied equal protection. For the rule making constitutional amendment difficult is grounded in neutral principle.

Hunter, 393 U.S. at 394-95 (Harlan, J., concurring) (citation omitted).

[17] Prior to the passage of Initiative 350, which prohibited school boards from requiring any student to attend a school other than the one geographically nearest or next nearest to his home (and set forth a number of exceptions to this rule), *see Washington*, 458 U.S. at 462-63, "the power to determine what programs would most appropriately fill a school district's educational needs--including programs involving student assignment and desegregation--was firmly committed to the local board's discretion." *Id.* at 479-80.

majority opinion in *Hunter*. More specifically, the Court held that the Fourteenth Amendment reaches political structures that "distort[] governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Id.* at 467. It also stated that "laws structuring political institutions or allocating political power according to 'neutral principles' . . . are not subject to equal protection attack . . . . Because such laws make it more difficult for *every* group in the community to enact comparable laws, they 'provid[e] a just framework within which the diverse political groups in our society may fairly compete.'" *Id.* at 470 (quoting *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (emphasis in original)). In contrast, the initiative at issue in *Washington* did "not attemp[t] to allocate governmental power on the basis of any general principle," *id.* at 470 (quoting *Hunter*, 393 U.S. at 395 (Harlan, J., concurring)), but rather, used "the racial nature of an issue to define the governmental decisionmaking structure, and thus impose[d] substantial and unique burdens on racial minorities." *Id.*

Thus, while *Washington*, like *Hunter*, involved an initiative that affected a racial minority, and while this fact weighed heavily in the Court's consideration of this case, it would be erroneous to conclude that the "neutral principle" precept is applicable only in the context of racial discrimination. Indeed, such a reading of *Hunter* and *Washington* would be antithetical to the neutral principle itself, for the requirement of neutrality would in fact only be a requirement of nondiscrimination with respect to racial minorities -- and not at all a requirement that legislation must "attemp[t] to allocate governmental power on the basis of any general principle." *Id.* at 470 (quoting *Hunter*, 393 U.S. at 395 (Harlan, J., concurring)). Thus, while *Hunter* and *Washington* are indeed cases which involved racial

minorities, the principle articulated in those cases clearly is not one that can logically be limited to the "race" context alone.[18]

This was made clear in *Gordon v. Lance*, 403 U.S. 1 (1971). In *Gordon*, the Court upheld a West Virginia statute that required approval by a 60% majority of any proposed increase in bond indebtedness or state tax rates. Plaintiffs, a group of individuals who had voted in favor of two proposals covered by the 60% requirement, sought a declaratory judgment that the 60% requirement was unconstitutional under the Equal Protection Clause.[19]

---

[18] In *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648, 655 (Cal. Ct. App. 1991), the court, in reviewing a proposed ballot initiative whereunder "persons seeking protective legislation against discrimination based on sexual orientation or AIDS must attempt to persuade a majority of the voters that such an ordinance is desirable," concluded that:

> Precisely this arrangement was condemned in *Hunter v. Erickson* . . . in which the court invalidated an ordinance which similarly required voter approval for any ordinance prohibiting housing discrimination on the basis of race, religion, or ancestry.
>
> The court held that such an ordinance drew an impermissible "distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends". . . . Although the ordinance did not focus on members of minority groups, the court observed that "the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination . . . ."

[19] One proposal called for the issuance of general obligation bonds for the purpose of building a new school and improving existing educational facilities. The second proposal authorized the Board of Education to levy additional taxes to support current expenditures and capital improvements. *Gordon*, 403 U.S. at 3. Of the votes cast, 51.55% favored the bond issue and 51.51% favored the tax levy. *Id.*

The Supreme Court, in reversing the West Virginia Supreme Court of Appeals, turned its attention to the applicability of *Hunter*. The Court distinguished *Hunter* on the grounds that, unlike the West Virginia statute, which "applie[d] equally to all bond issues for any purpose, whether for schools, sewers, or highways," the municipal ordinance in *Hunter* subjected "fair housing legislation alone . . . to an automatic referendum requirement." *Gordon*, 403 U.S. at 5. Furthermore, unlike *Hunter*, where "[t]he class singled out . . . was clear--'those who would benefit from laws barring racial, religious, or ancestral discriminations,'" the Court was unable to discern any "independently identifiable group or category that favors bonded indebtedness over other forms of financing." *Id.* at 5. Thus, the Court concluded, "no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote." *Id.* (citation omitted).

The significance of the *Gordon* Court's discussion of *Hunter* is twofold. First, it is meaningful that the issue in *Gordon* had nothing to do with racial minorities or any other traditionally suspect class, yet the Court felt compelled to discuss *Hunter*. In the course of that discussion, no mention was made of the fact that the West Virginia law was racially neutral, whereas the Akron law clearly was not. If, as the defendants suggest here, *Hunter* is a "race" case and nothing more, the Supreme Court could have summarily dismissed the notion that it was applicable in *Gordon*. The fact that the Court did not do so, however, strongly suggests that the holding of *Hunter* cannot be limited in application only to the review of legislation which discriminates on the basis of race.

Second, although the *Gordon* Court recognized that the Akron law singled out those who would benefit from laws barring racial, religious, or ancestral discrimination, no significance was placed on the nature of the class discriminated against in *Hunter*. Rather, the salient aspect of *Hunter* which distinguished it from the situation presented in *Gordon* was the absence of a group of voters that was

"independently identifiable" apart from the group created by the statute itself.[20]

When taken together, these facts clearly support the conclusion that *Hunter* applies to a broad spectrum of discriminatory legislation. This becomes abundantly clear in light of the *Gordon* Court's articulation of the controlling constitutional standard: "We conclude that so long as such provisions do not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause." *Gordon*, 403 U.S. at 7.[21]

---

[20] In *Town of Lockport, N.Y. v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259, 268 n.13 (1977), the Court cited *Gordon* and *Hunter* as support for the proposition that "a referendum voting scheme that can be characterized in mathematical terms as giving disproportionate power to a minority does not violate the Equal Protection Clause, there being no discrimination against an identifiable class."

[21] In so concluding, we are mindful that a majority of the Supreme Court in *James v. Valtierra*, 402 U.S. 137 (1971), upheld the constitutionality of a California constitutional amendment that required majority approval in a community election for the construction of any low-rent housing project. The Court held that the mandatory referendum procedure, which was not limited to proposals for low-cost public housing, ensured democratic decisionmaking and did not violate the Equal Protection Clause. In reaching this conclusion, the Court declined to "extend" *Hunter* to a provision which was not "aimed at a racial minority." *James*, 402 U.S. at 141.

Three Justices dissented, not by taking issue with the majority's use of *Hunter*, but on the basis that the provision should be invalidated on the grounds that poverty is a suspect classification. It is significant to note that all of the Justices who joined in the majority opinion in *James* also joined the later opinion in *Gordon* (as did Justice Douglas who did not participate in *James*), which itself made no reference to *James*. The two Justices who dissented in *Gordon* (Justices Brennan and Marshall) did not do so on the basis of the majority's application of *Hunter*.

Thus, we are of the opinion that *James* is best understood as a case declining to apply suspect class status to the poor, and not as a limitation on

B

We conclude that the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on this right by "fencing out" an independently identifiable class of persons must be subject to strict judicial scrutiny.[22]

We reject defendants' contention that Amendment 2 cannot be understood to infringe on any recognized right protected under the Equal Protection Clause. We do so for a number of reasons. First, defendants urge that the authority relied on in reaching our conclusion, when "properly analyzed," recognizes a cognizable equal protection claim "only when the political process has been restructured to place unusual burdens upon racial groups, or, in the most expansive sense, [upon politically powerless groups]." This

---

Hunter.

[22] Professor Michelman characterizes the Supreme Court's jurisprudence in the participation cases as establishing that,

> by force of the equal protection clause, "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction,". . . [T]hat this right is among those it classes as "fundamental,". . . so that any restriction of it "must be carefully and meticulously scrutinized,". . . to determine whether it is "necessary to promote a compelling state interest." Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 Fla. L. Rev. 443, 459 n.63 (1989).

contention belies the fact that much of the authority relied on in reaching our conclusion did not involve racial groups.[23]

Moreover, as *Gordon v. Lance*, 403 U.S. 1 (1971), makes clear, and the language of *Hunter v. Erickson*, 393 U.S. 385 (1969), itself indicates, the principle that a "State may no more disadvantage any particular group by making it more difficult to enact legislation on its behalf than it may dilute any person's vote or give any groups smaller representation than another of comparable size," *Hunter*, 393 U.S. at 393, does not apply simply to racial minorities.

Finally, if the cases referred to above were decided solely on the basis of the "suspect" nature of the classes involved, there would have been no need for the Court to consistently express the paramount importance of political participation or to subject legislation which infringed on the right to participate equally in the political process to strict judicial scrutiny. To the contrary, were these simply "race cases," the Supreme Court would have been required to do nothing more than note that the legislation at issue drew a classification that was inherently suspect (*i.e.*, that discriminated on the basis of race), and apply strict scrutiny to resolve those cases -- irrespective of the right, entitlement, or opportunity that was being restricted. *Compare Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628 n.9 (1969) ("we have long held that if the basis of classification is inherently suspect, such as race, the statute must be subjected to an exacting scrutiny, regardless of the subject matter of the legislation") *with Graham v. Richardson*, 403 U.S. 365, 375 (1971) ("It is enough to say that the classification involved in *Shapiro [v. Thompson*, 394 U.S. 618 (1969)] was subjected to strict scrutiny under the compelling

---

[23] *See, e.g., Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Gordon v. Lance*, 403 U.S. 1 (1971); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

state interest test, not because it was based on any suspect criterion such as race, nationality, or alienage, but because it impinged upon the fundamental right of interstate movement.").

We similarly reject defendants' contention that the right of equal political participation "can only work when applied to suspect classifications . . . [for any broader application will] necessarily mandate[] that all legal and policy choices be made at the lowest governmental level possible." This argument is based on defendants' observation that the Colorado Constitution creates numerous burdens which, in order to be overcome, require a constitutional amendment, such as article XVIII, section 9, (permitting limited gaming only in Central City, Blackhawk, and Cripple Creek) and article XIX, section 2, (prohibiting the General Assembly from proposing amendments to more than six articles of the state constitution at the same session).

While defendants are correct in observing that there are constitutional provisions which create some barriers to those who might seek governmental action in conflict with these provisions, it cannot be said that the provisions cited by defendants isolate any "independently identifiable group," *Gordon v. Lance*, 403 U.S. 1, 5 (1971), from pursuing its political objectives. In fact, the precise argument defendants now advance was expressly rejected by the Supreme Court in *Gordon*. As noted above, the constitution and statutes at issue in *Gordon* required a 60% majority before certain bonds or tax levies could be passed. The Court, in refusing to apply the principle of *Hunter v. Erickson*, 395 U.S. 385 (1969), under the facts of *Gordon*, noted that "[i]n contrast [to the class singled out in *Hunter*] we can discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing. Consequently no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote." *Gordon*, 403 U.S. at 5 (citation omitted). We find this reasoning

both controlling and persuasive here. The same cannot be said, however, of Amendment 2.[24]

We therefore conclude that defendants' argument that the right to participate equally in the political process applies only to traditionally suspect classes is without merit. Similarly, we reject their argument that the above cited authorities are properly understood only as "suspect class" cases, and not "fundamental rights" cases. We turn, therefore, to the question of whether Amendment 2 has been shown, to a reasonable degree of probability, to infringe on the fundamental right to participate equally in the political process beyond a reasonable doubt.

IV

In reviewing Amendment 2, we do so in light of its immediate objective, its ultimate effect, its historical context, and the conditions existing prior to its enactment. *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967).

The immediate objective of Amendment 2 is, at a minimum,[25] to repeal existing statutes, regulations, ordinances, and

---

[24] *See infra* at 32-37.

[25] The parties sharply disagree on the scope of Amendment 2's provisions. For example, defendants argue that Amendment 2 "does not prevent the enforcement of rights derived from other sources including federal law; it allows enforcement of rights from private contracts; and does not prevent private companies [from adopting policies prohibiting discrimination based on sexual orientation]," and conclude that Amendment 2 "prohibits only the recognition or enforcement of state or locally created civil rights protections above and beyond those required by federal law." Plaintiffs, in contrast, argue that "defendants' interpretation bears little resemblance to the language of Amendment 2," and conclude that, on its face, the amendment clearly limits the sort of redress that defendants argue

policies of state and local entities that barred discrimination based on sexual orientation. *See* Aspen, Colo., Mun. Code § 13-98 (1977) (prohibiting discrimination in employment, housing and public accommodations on the basis of sexual orientation); Boulder, Colo., Rev. Code § § 12-1-2 to -4 (1987) (same); Denver, Colo., Rev. Mun. Code art. IV, § § 28-91 to -116 (1991) (same); Executive Order No. D0035 (December 10, 1990) (prohibiting employment discrimination for "all state employees, classified and exempt" on the basis of sexual orientation); Colorado Insurance Code, § 10-3-1104, 4A C.R.S. (1992 Supp.) (forbidding health insurance providers from determining insurability and premiums based on an applicant's, a beneficiary's, or an insured's sexual orientation); and various provisions prohibiting discrimination based on sexual orientation at state colleges.[26]

The "ultimate effect"[27] of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures. In the absence of such a constitutional amendment, any governmental entity

---

it does not.

The precise scope of Amendment 2 need not be determined here, however, because neither the parties, nor their amici, have contended that Amendment 2 does not prohibit the enactment of antidiscrimination laws by state or local entities. Since all agree that Amendment 2 unambiguously attempts to do this, and since that restriction alone provides a sufficient basis for our conclusion, we need not determine what broader application Amendment 2 might have.

[26] Metropolitan State College of Denver prohibits college sponsored social clubs from discriminating in membership on the basis of sexual orientation and Colorado State University has an antidiscrimination policy which encompasses sexual orientation. *See* Legislative Council of the Colorado General Assembly, An Analysis of 1992 Ballot Proposals (Research Publ. No. 369, p. 10, 1992).

[27] *See supra* note 25.

would be acting contrary to the state constitution by "adopting, enacting, or enforcing" any such measure.

Thus, the right to participate equally in the political process is clearly affected by Amendment 2, because it bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation. Amendment 2 alters the political process so that a targeted class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of a majority of the electorate through the adoption of a constitutional amendment. Rather than attempting to withdraw antidiscrimination issues as a whole from state and local control, Amendment 2 singles out one form of discrimination and removes its redress from consideration by the normal political processes.

Amendment 2 expressly fences out an independently identifiable group. Like the laws that were invalidated in *Hunter,* which singled out the class of persons "who would benefit from laws barring racial, religious, or ancestral discriminations," *Hunter,* 393 U.S. at 391, Amendment 2 singles out that class of persons (namely gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation. No other identifiable group faces such a burden -- no other group's ability to participate in the political process is restricted and encumbered in a like manner. Such a structuring of the political process undoubtedly is contrary to the notion that "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." *Gray v. Sanders,* 372 U.S. 368, 379-80 (1963).

In short, gay men, lesbians, and bisexuals are left out of the political process through the denial of having an "effective voice in the governmental affairs which substantially affect their lives." *Kramer,* 395 U.S. at 627. Strict scrutiny is thus required because the

normal political processes no longer operate to protect these persons. Rather, they, and they alone, must amend the state constitution in order to seek legislation which is beneficial to them. By constitutionalizing the prescription that no branch or department, nor any agency or political subdivision of the state "shall enact, adopt, or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation . . . shall constitute or otherwise be the basis of . . .[a] claim of discrimination," Amendment 2 singles out and prohibits this class of persons from seeking governmental action favorable to it and thus, from participating equally in the political process.[28]

Prior to the passage of this amendment, gay men, lesbians, and bisexuals were, of course, free to appeal to state and local government for protection against discrimination based on their sexual orientation.[29]

Thus, like any other members of the electorate, the political process was open to them to seek legislation or other enactments

---

[28] As for the State's contention that "[t]he plaintiffs continue to have the ability to participate fully in all of Colorado's political processes; what they do not have is a right to *successful* participation in the process," we think this misconstrues the nature of plaintiffs' participatory rights. While the State is quite right that the plaintiff class, like any other members of society, has no right to successful participation in the political process, the fact remains that its unsuccessful participation is mandated by the provisions of Amendment 2. In contrast to all other members of the electorate whose successful or unsuccessful participation in the process cannot be determined until ballots, votes, charters, etc., have been counted or voted upon, with the exception of a state constitutional amendment, gay men, lesbians, and bisexuals are told that "you can appeal to government on those issues of concern to you, but you will, by virtue of Amendment 2, lose -- irrespective of your ability to summon the support of others, or carry a majority in an election."

[29] Indeed, this class of persons had done precisely this with some measure of success. *See supra* at 33-34.

deemed beneficial in the same way it was open to all others. Were Amendment 2 in force, however, the sole political avenue by which this class could seek such protection would be through the constitutional amendment process. In short, Amendment 2, to a reasonable probability, infringes on a fundamental right protected by the Equal Protection Clause of the United States Constitution. Amendment 2 must be subject to strict judicial scrutiny in order to determine whether it is constitutionally valid under the Equal Protection Clause.

Because the defendants and their amici have not proffered any compelling state interest to justify the enactment of Amendment 2 at this stage of the proceedings as required under the strict scrutiny standard of review, *see Plyler v. Doe,* 457 U.S. 202, 217 (1982); *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 440 (1985), we conclude that plaintiffs have met their burden under *Rathke v. MacFarlane,* 648 P.2d 648, 653 (Colo. 1982).

V

That Amendment 2 was passed by a majority of voters through the initiative process as an expression of popular will mandates great deference. However, the facts remain that "[o]ne's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections," *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 638 (1943), and that "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Forty-Fourth Gen. Assembly of Colo.,* 377 U.S. 713, 736 (1964).

We reject defendants' argument that the trial court erred in granting a preliminary injunction enjoining defendants from enforcing Amendment 2 pending a trial on the merits of plaintiffs' constitutional challenge.

Order affirmed.

JUSTICE ERICKSON dissents.

Evans v. Romer, No. 93SA17
JUSTICE ERICKSON dissenting:

I respectfully dissent. This is an appeal of a district court order granting a preliminary injunction that prohibits the Governor and the Attorney General from enforcing a voter- initiated amendment to the Colorado Constitution ("Amendment 2").[1] The issue before us is whether the district court for the City and County of Denver properly concluded that the appellees met the requirements set forth in *Rathke v. MacFarlane,* 648 P.2d 648 (Colo. 1982), and C.R.C.P. 65, for the issuance of a preliminary injunction. Because we are reviewing the district court's underlying legal premise for the injunction, we are obligated to apply a de novo standard of review. Based on that standard, I would reverse and discharge the preliminary injunction, and remand for trial on the permanent injunction.

The district court issued the preliminary injunction based on its conclusion that Amendment 2 must be evaluated under the strict scrutiny standard of review. The strict scrutiny standard of review was found to be applicable based on a *fundamental right* "not to have the State endorse and give effect to private biases" with respect to "an identifiable class." The district court's delineation of the fundamental right supporting the preliminary injunction has never been identified or recognized by the United States Supreme Court or by any other court. As such, the district court's recognition of a new fundamental right is based on an underlying legal premise that is erroneous.

The majority upholds the preliminary injunction and agrees that Amendment 2 should be evaluated under the strict scrutiny standard of review. Unlike the district court, however, the majority

---

[1] A state constitutional amendment passed through the initiative process "shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed." *See* Colo. Const. art. V, § 1. The injunction was sought to prevent Amendment 2 from taking effect.

concludes that strict scrutiny applies based on the recognition of a different *fundamental right,* "the right to participate equally in the political process." Maj. op. at 14. In my view, based on the United States Supreme Court precedent cited in the majority opinion, the majority's conclusion is also erroneous.

Since I cannot agree that Amendment 2 should be evaluated under the strict scrutiny standard of review based on Supreme Court precedent defining fundamental constitutional rights, I would reverse the district court and discharge the preliminary injunction.

I

On November 3, 1992, Amendment 2 passed by a margin of 813,966 to 710,151. Amendment 2 provides:

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

On November 12, 1992, the appellees filed suit to permanently enjoin the enforcement of Amendment 2, alleging that it violated provisions of both the Colorado and United States Constitutions. The appellees claimed, *inter alia,* that Amendment 2

violated (1) the rights to freedom of association and expression under the First Amendment; (2) the fundamental right to petition the government for redress of grievances; (3) the fundamental right to vote; and (4) the fundamental right to participate equally in the political process. After the district court rejected the request of the appellees for an expedited hearing on the merits, they filed motions to preliminarily enjoin the Governor and the Attorney General from enforcing Amendment 2.

The appellees based their motion for a preliminary injunction solely on the United States Constitution, claiming that Amendment 2 violated their First Amendment right to freedom of expression and their Fourteenth Amendment right to equal protection of the laws.[2] In their motion, the appellees did not claim that Amendment 2 violated the Equal Protection Clause because a suspect class was involved.[3] Instead, the appellees based their equal protection

---

[2] An amendment to the state constitution cannot be unconstitutional, unless and to the extent it violates the United States Constitution. *Cf.* Colo. Const. art. II, § 2; *Cooper Motors, Inc. v. Board of County Comm'rs*, 131 Colo. 78, 84, 279 P.2d 685, 688 (1955) ("[t]he people can do any thing by constitutional amendment unless prohibited by the terms of the Constitution of the United States").

[3] The majority recognizes that gay men, lesbians, and bisexuals constitute an "identifiable group." Maj. op. at 33. This conclusion is true, just as is the fact each of the three groups standing alone constitutes an identifiable group based on the sexual orientation and conduct of gay men, lesbians, and bisexuals. The mere fact that a group can be identified, however, does not mean that the group constitutes a suspect class that receives heightened scrutiny under the Equal Protection Clause. *See, e.g.*, *Heller v. Doe*, No. 92-351, 1993 WL 218271, at *5 (U.S. June 24, 1993) (recognizing that the Supreme Court has declined to apply heightened scrutiny to the identifiable groups of the mentally ill or the mentally retarded); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (declining to apply heightened scrutiny to the identifiable group of elderly individuals).

argument on an alleged infringement of the fundamental right to participate equally in the political process. The appellees claimed that if the district court concluded that Amendment 2 impinged on either the First or the Fourteenth Amendment, a strict scrutiny standard of review should apply under which the State would have the burden of establishing a compelling state interest.[4]

In fact, courts have consistently rejected claims that the identifiable group of homosexuals constitutes a suspect class. *See, e.g.*, *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (concluding that homosexuals are neither a suspect or quasi-suspect class); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (same), *cert. denied sub nom. Ben-Shalom v. Stone*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same), *cert. denied*, 494 U.S. 1003 (1990); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (same); *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984) (same), *aff'd*, 470 U.S. 903 (1985); *Steffan v. Cheney*, 780 F. Supp. 1, 10 (D.D.C. 1991) (same).

For example, *Padula* rejected the claim that homosexuals constitute a suspect class by stating that "[i]f the Court [in *Bowers v. Hardwick*, 478 U.S. 186 (1986)] was unwilling to object to state laws that criminalized the behavior that defines the class, it is hardly open to a lower court to conclude that state- sponsored discrimination against the class is invidious [because] there can hardly be a more palpable discrimination against a class than making the conduct that defines the class criminal." *Padula*, 822 F.2d at 103. A number of states continue to classify the conduct that defines the class as criminal behavior. *See, e.g.*, Ala. Code § 13A-6-65(a)(3) (1975); Ark. Code Ann. § 5-14-122 (Michie 1987); Ga. Code Ann. § 16-6-2 (1992); Kan. Stat. Ann. § 21-3505 (1988 & 1992 Supp.); Ky. Rev. Stat. Ann. § 510.100 (Michie/Bobbs-Merrill 1990); Md. Code Ann. Crimes and Punishment 554 (1954); Mich. Stat. Ann. § 28.355 (Callaghan 1990); Minn. Stat. § 609.293 (1992); N.Y. Penal Law § 130.38 (McKinney 1987); Okla. Stat. Ann. tit. 21, § 886 (West 1983 & 1993 Supp.); S.D. Codified Laws Ann. § 22-22-2 (1988 & 1993 Supp.).

[4] The appellees alternatively asserted that the burdens Amendment 2 imposed on gay men, lesbians, and bisexuals lacked a rational basis.

After conducting a four-day hearing and without making any findings of fact, the district court granted the preliminary injunction. In rendering its decision, the district court agreed that the strict scrutiny standard of review applied to Amendment 2. However, the district court did not rely upon either the First Amendment argument advanced by the appellees or address the fundamental right asserted by the appellees in their motion for the preliminary injunction. Instead, the district court held that Amendment 2 must satisfy the strict scrutiny standard of review based on a fundamental right not to have the State endorse and give effect to private biases.[5] Pending resolution of this appeal, trial has been set in October 1993, to determine whether a permanent injunction should be issued.

II

Although this case presents a number of legal questions, it is not necessary or appropriate for this court to determine all of the issues raised before the district court. The sole issue before us on this appeal is the validity of the preliminary injunction issued by the district court. As such, the logical starting point is the district court's order and the reasons for the entry of the preliminary injunction. Neither the majority nor the appellees defend the underlying premise of the district court's order which identified a new fundamental right as the basis for applying the strict scrutiny standard of review. The explanation is simple--the district court erred in issuing a preliminary injunction based on a fundamental right not to have the State endorse and give effect to private biases. Before addressing the district

---

[5] The appellees assert on appeal that "read in light of the arguments actually presented to the district court, th[e district court's] holding is best construed to mean that Amendment 2 violates the plaintiffs' fundamental right of political participation." As the majority recognizes, this assertion is meritless. *See* maj. op. at 8. The district court's order simply does not address the fundamental rights argument advanced by the appellees or their First Amendment claim.

court's order, however, it is necessary to outline the appropriate standard of review on appeal for the issuance of a preliminary injunction.

A

It is well settled that an appellate court must reverse the granting of a preliminary injunction if the issuance of the injunction, in light of the applicable standard, constituted an abuse of discretion. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975); *Shango v. Jurich*, 681 F.2d 1091, 1096 (7th Cir. 1982); *e.g., Wakabayashi v. Tooley*, 648 P.2d 655 (Colo. 1982). In *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982), we delineated the standard for a trial court to apply in ruling on a preliminary injunction motion. Before a trial court may issue a preliminary injunction under *Rathke*, "the moving party must establish, as a threshold requirement, a clear showing that injunctive relief is necessary to protect existing . . . fundamental constitutional rights." *Id.* at 653. Accordingly, to determine whether the threshold requirement of *Rathke* is satisfied, a trial court must analyze whether the United States Supreme Court has recognized the fundamental right at issue. *Id.*; *cf. Dronenburg v. Zech*, 741 F.2d 1388, 1396 n.5 (D.C. Cir. 1984) (stating that "the only question open to [a lower court is] whether the Supreme Court has created a right, which, fairly defined, covers the case before [it] or whether the Supreme Court has specified a mode of analysis, a methodology, which, honestly applied, reaches the case [it] must now decide").

The issuance of a preliminary injunction by a trial court must also be guided by sound legal principles. *See Shango*, 681 F.2d at 1096; *Charles v. Carey*, 627 F.2d 772, 776 (7th Cir. 1980). When a preliminary injunction is based on an erroneous legal premise, the underlying premise is subject to de novo review by an appellate court, which can determine whether the premise is erroneous. *See Shango*, 681 F.2d at 1096; *Buffalo Courier-Express, Inc. v. Buffalo Evening*

News, 601 F.2d 48, 59 (2d Cir. 1979); *Douglas v. Beneficial Fin. Co.*, 469 F.2d 453, 454 (9th Cir. 1972); *Delaware & Hudson Ry. Co. v. United Transp. Union*, 450 F.2d 603, 620 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971); *Quaker Action Group v. Hickel*, 421 F.2d 1111, 1115 (D.C. Cir. 1969); *accord Bloomer v. Boulder County Bd. of Comm'rs*, 799 P.2d 942, 944 (Colo. 1990). While a determination on appeal that a trial court's underlying legal premise is erroneous does not reflect that the trial court was chargeable with an abuse of discretion, *see Delaware*, 450 F.2d at 620-21, a preliminary injunction predicated on a clear mistake of law may nevertheless require reversal. *Shango*, 681 F.2d at 1096; *Charles*, 627 F.2d at 776; *Delaware*, 450 F.2d at 623.

Based on the foregoing principles, it is appropriate to apply a de novo standard of review in this case to evaluate the district court's underlying legal premise that the Supreme Court has recognized a fundamental right not to have the State endorse and give effect to private biases. A review of Supreme Court jurisprudence concerning fundamental rights is therefore necessary to determine whether the premise relied upon by the district court is erroneous.[6]

---

[6] Our review in this case is limited to the United States Constitution. *See supra* note 2 and accompanying text. Accordingly, we are required to follow the pronouncements of the Supreme Court. *People v. Cisneros*, No. 91SC467, 1993 WL 242337, at *9 (Colo. July 6, 1993) (Erickson, J., concurring) (stating that state courts are bound by Supreme Court precedent interpreting the federal Constitution and cannot impose greater limitations or afford more protections under the federal Constitution than the Supreme Court has in its decisions); *cf. Lockhart v. Fretwell*, 113 S. Ct. 838, 846 (1993) (Thomas, J., concurring) (stating that under the structure of our national system, a state court decision interpreting the federal Constitution is no less authoritative than a lower federal court decision).

B

Under traditional equal protection analysis, legislation that involves a suspect classification *or* affects a fundamental right is subject to the strict scrutiny standard of review. *Heller v. Doe,* No. 92-351, 1993 WL 218271, at *5 (U.S June 24, 1993); *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 440 (1985); *see generally* 3 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law Substance and Procedure* 18.3, at 12-28 (2d ed. 1992 & 1993 Supp.) [hereinafter *Treatise on Constitutional Law*]. If the government cannot show a compelling state interest, legislation that involves a suspect classification or affects a fundamental right will be declared unconstitutional. *See Heller,* 1993 WL 218271, at *5; *Cleburne,* 473 U.S. at 440.

Justice Stone's discussion of "discrete and insular minorities" in his renowned footnote 4 of *United States v. Carolene Products Co.,* 304 U.S. 144 (1938), explains the rationale for subjecting legislation involving a suspect classification to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *See Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 313 (1976); *e.g., Graham v. Richardson,* 403 U.S. 365, 372 (1971).[7] Since that time, the Supreme Court has held, without exception, that the strict scrutiny standard of review applies to legislation or state

---

[7] Justice Stone explained in footnote 4:

> [W]e need [not] enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Carolene Products, 304 U.S. at 152-53 n.4 (citations omitted).

constitutional amendments based on traditionally suspect classifications. *See, e.g., Graham,* 403 U.S. at 372 (alienage); *Loving v. Virginia,* 388 U.S. 1, 11 (1967) (race); *Korematsu v. United States,* 323 U.S. 214, 215 (1944) (national origin).[8]

Similarly, the Supreme Court has held repeatedly that the strict scrutiny standard of review applies to legislation that affects a "fundamental" constitutional right. The identification of a right as a fundamental right is a substantive decision unrelated to equal protection or the technical standards of review. *See* 3 *Treatise on Constitutional Law* § 18.3, at 18; *see generally* 2 *Treatise on Constitutional Law* § 15.7, at 427-37. The decision of whether a right is fundamental involves a judicial determination that the text or structure of the federal Constitution evidences a value that should be taken from the control of the political branches of government and is best characterized as a substantive due process decision. *See* 3 *Treatise on Constitutional Law* 18.3, at 18 n.19; *Bowers v. Hardwick,* 478 U.S. 186, 197 (1986) (Powell, J., concurring); *see also San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 33-34 (1973) (suggesting that fundamental rights must be explicitly or implicitly guaranteed by the United States Constitution).

For example, the decision of the Supreme Court to find the right to vote to be a constitutionally protected fundamental right that is subject to the strict scrutiny standard of review was a substantive due process determination based on an analysis of the importance of the right to vote and the provisions of the Constitution. *See* 3 *Treatise on Constitutional Law* 18.31, at 766. The Supreme Court has employed similar analysis to recognize the fundamental rights of interstate travel, *Shapiro v. Thompson,* 394 U.S. 618 (1969), privacy,

---

[8] In this case, the appellees did not assert before the district court or on appeal that Amendment 2 should be evaluated under the strict scrutiny standard of review based on suspect class analysis. *See also supra* note 3 (listing courts that have rejected argument that homosexuals constitute a suspect class).

Griswold v. Connecticut, 381 U.S. 479, 484 (1965), and most of the provisions set forth in the Bill of Rights. *See, e.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (using equal protection analysis to strike down a law that infringed upon fundamental rights within the First Amendment).[9]

---

[9] Under the Due Process Clause of the Fourteenth Amendment, most of the provisions of the Bill of Rights have been applied to the states because the Supreme Court has found them to be "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319 (1937), or "fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 148-49, *reh'g denied*, 392 U.S. 947 (1968). Today, virtually all of the provisions of the Bill of Rights have been incorporated into the Fourteenth Amendment. *E.g., Benton v. Maryland*, 395 U.S. 784 (1969) (incorporating Fifth Amendment protection against double jeopardy); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (incorporating Sixth Amendment right to counsel in criminal prosecution); *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating Fourth Amendment regulation against unreasonable search and seizures); *Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating First Amendment free speech protection); *but see Hurtado v. California*, 110 U.S. 516 (1884) (refusing to incorporate grand jury indictment guarantee of the Fifth Amendment).

The rights that have been held applicable to the states through the Fourteenth Amendment are also considered fundamental rights for purposes of equal protection analysis. *See* 3 *Treatise on Constitutional Law* § 18.39, at 490. As Professors Nowak and Rotunda explain:

> [L]aws which classify persons in terms of their abilities to exercise rights which have specific recognition in the first eight amendments do not generally arise as equal protection issues. In these instances the denial of the right to one class of persons is likely to be held a violation of the specific guarantee without any need to resort to equal protection analysis. Thus, if the state or federal government were to deny to a specific class of persons the right to bail upon certain criminal charges, the classification should be analyzed to determine the compatibility of the law with the substantive guarantees of the eighth amendment prohibition of excessive bail, although it could just as easily be analyzed as an equal protection issue.

For the most part, however, the Supreme Court has refused to expand the list of fundamental constitutional rights. The number of rights that the Supreme Court has found to be fundamental, and therefore worthy of strict judicial scrutiny, is quite limited. Among others, the Supreme Court has refused to declare education, housing, welfare payments, or government employment to be of fundamental constitutional value. *See* 3 *Treatise on Constitutional Law* § 18.42, at 821-31.

Bowers v. Hardwick, 478 U.S. 186 (1986), in which the Supreme Court rejected the assertion that the federal Constitution conferred a fundamental right on homosexuals to engage in sodomy, is instructive of the type of analysis used by the High Court to address the substantive due process question of whether a fundamental right exists. In answering the substantive due process question, Justice White reviewed prior cases addressing fundamental rights:

> Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937), it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.), where they are characterized as those liberties that are "deeply rooted in this

---

Id. at 490-91.

> Nation's history and tradition." *Id.*, at 503 (Powell, J.). *See also Griswold v. Connecticut*, 381 U.S., at 506.
>
> It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy.

Bowers, 478 U.S. at 191-92; *see generally* John E. Nowak, *The "Sixty-Something" Anniversary of the Bill of Rights*, 1992 U. Ill. L. Rev. 445, 462-76 (reviewing different methods of constitutional interpretation).

Having concluded that a fundamental right to engage in homosexual sodomy did not exist, Justice White emphasized that the case also "call[ed] for some judgment about the limits of the Court's role in carrying out its constitutional mandate," *Bowers*, 478 U.S. at 190, and stated:

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. *There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental.*

> Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Id. at 194-95 (emphasis added). Given the express reluctance of the Supreme Court to recognize "new" fundamental rights, I address the district court's order.

C

In this case, the district court's underlying legal premise that the Supreme Court has recognized a fundamental right not to have the State endorse and give effect to private biases provided the basis for issuing the preliminary injunction. However, a review of the Supreme Court precedent cited by the district court to justify the issuance of the preliminary injunction leads me to conclude that the Supreme Court has not recognized the fundamental right identified by the district court.

In support of its recognition of a new fundamental right, the district court cited language from *Reitman v. Mulkey*, 387 U.S. 369 (1967), and *Palmore v. Sidoti*, 466 U.S. 429 (1984). The district court also referred to *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), and *Pruitt v. Cheney*, 943 F.2d 989 (9th Cir. 1991) to bolster its reasoning. Properly analyzed, these cases do not support judicial recognition of a fundamental right not to have the State endorse and give effect to private biases, but rather indicate that the district court extrapolated a fundamental right from the language appearing in the various decisions.

In *Reitman*, the Supreme Court reviewed a voter-initiated state constitutional amendment which the California Supreme Court concluded was intended to encourage and authorize racial

discrimination. *Reitman*, 387 U.S. at 376. The California Supreme Court found that the intent of the constitutional amendment was to create a constitutional right to discriminate on racial grounds and therefore dealt with the amendment as though it expressly authorized and constitutionalized the private right to discriminate against racial minorities. *Id.* The Supreme Court accepted the findings of the California court and concluded that "there was no sound reason [to] reject [its] judgment" that the amendment involved racial discrimination in violation of the Fourteenth Amendment. *Id.*

Language subsequently appeared in *Reitman* which was seized on by the district court in support of the recognition of a fundamental right of any identifiable group not to have the state endorse and give effect to private biases. *Reitman* stated:

> The right to discriminate, including the right to discriminate on *racial grounds*, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing *racial discriminations* need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.

Id. at 377 (emphasis added). Based on this language from *Reitman*, the district court characterized the analysis of the Supreme Court as involving a fundamental right. The district court's conclusion is erroneous insofar as *Reitman*'s equal protection analysis focused solely on the racial classification drawn by the constitutional amendment and represents traditional suspect classification analysis. As such, no court or commentator has ever viewed *Reitman*, either alone or in combination with other cases, as having applied fundamental right analysis.

In *Palmore*, the Supreme Court invalidated a child custody order that had been based solely on a judicial determination that it would be harmful to a child to remain in a racially mixed household. *Palmore*, 466 U.S. at 431. *Palmore* struck down the lower court's custody order because it represented invidious racial prejudice. In doing so, *Palmore* explicitly stressed the importance of the racial classification and accordingly concluded that the strict scrutiny standard of review applied. *Id.* at 432-33 (stating that "classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. Such classifications are subject to the most exacting scrutiny").

Palmore also stated "the Constitution cannot control such prejudices but neither can it tolerate them . . . private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.* at 433. Despite this language, which was cited by the district court in this case, the fact remains that *Palmore* was based on traditional suspect classification analysis and not a fundamental right not to have the State endorse and give effect to private biases. Like *Reitman*, no court or commentator has ever viewed *Palmore*, either alone or in combination with other cases, as having applied fundamental right analysis.

The district court further found that the citation to *Palmore* in *City of Cleburne* was significant. *City of Cleburne*, however, did not apply the strict scrutiny standard of review and stands only for the proposition that irrational biases cannot, in and of themselves, qualify as a legitimate governmental interest to satisfy rational basis review. The district court also mentioned *Pruitt*, a Ninth Circuit case involving discrimination against homosexuals in the military, because it also cited to *Palmore*. *Pruitt*, however, like *City of Cleburne*, did not apply the strict scrutiny standard of review. As such, neither case can be read as applying fundamental rights analysis.

The cases relied on by the district court as recognizing a fundamental right not to have the State endorse and give effect to private biases do not apply fundamental rights analysis, but rather involve traditionally suspect classifications or the application of rational basis review. Accordingly, I conclude that the district court's issuance of the preliminary injunction in this case was based on the application of an erroneous legal premise that has never been recognized by the Supreme Court.

III

I am also compelled to address the "fundamental right to participate equally in the political process" because the majority, applying de novo review to the district court's legal conclusion, upholds the granting of the preliminary junction based on its recognition of, and reliance on, a different fundamental right than that identified by the district court.[10] In my view, the majority's

---

[10] I note that in reviewing a preliminary injunction that has been granted by a trial court, we are not *required* to analyze the alternative grounds raised by the parties before the trial court, but not ruled on, or to discuss grounds not raised below by the parties. Based on the limited grounds on which this case is before us, we need not analyze the assertion of the appellees that a preliminary injunction could have been properly issued based on a fundamental right to participate equally in the political process any more than we need address the original assertions of the appellees that Amendment 2 violated their (1) fundamental right to freedom of expression; (2) fundamental right to petition the government for redress of grievances; or (3) fundamental right to vote. Recognizing this fact, the appellees assert on appeal that the district court's ruling is best construed as holding that Amendment 2 infringes upon the fundamental right of political participation. *See supra* note 5.

Because the district court's ruling cannot be so construed, the majority justifies upholding the injunction on a different legal basis than that relied on by the district court by citing to *Farmers Group, Inc. v. Williams*, 805 P.2d 419, 428 (Colo. 1991). Neither the majority nor the appellees cite

underlying legal premise that Supreme Court precedent has recognized such a fundamental right is also erroneous and provides no support for the conclusion that the strict scrutiny standard of review applies in this case.

The majority's extensive review of prior Supreme Court decisions indicates that language discussing citizen participation has appeared in a variety of contexts in numerous equal protection opinions. The traditional reading of these cases, however, suggests that the majority's analysis suffers from the same flaw as the district court's analysis--at no point has the Supreme Court explicitly identified the fundamental right that the majority extrapolates from the Supreme Court decisions on which it relies.

Appropriately categorized, there is no more of a common thread uniting the decisions cited by the majority than there is a common thread of logic or precedent to support the district court's analysis.[11] In my view, the cases cited by the majority all fall within Supreme Court decisions that address either the fundamental right to vote or ballot access, or opinions that involve suspect classifications. Based on a review of each of these three categories,

---

to any case where an appellate court has upheld a preliminary injunction based on different legal grounds than those articulated and relied on by the trial court. However, I agree that if a trial court erred in applying the applicable law, an appellate court, pursuant to its ability to review the underlying legal premises de novo, may apply the correct legal standard and uphold the injunction if supported by the record. *See Rowland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 385 (7th Cir. 1984) (stating that any purely legal determination made by a trial judge in granting or denying a preliminary injunction is subject to plenary appellate review).

[11] The majority's suggestion that a fundamental right to participate equally in the political process encompasses a wide variety of Supreme Court equal protection opinions in many ways is akin to the district court's delineation of the fundamental right it identified based on language drawn from other equal protection decisions.

I conclude that the majority's underlying legal premise that the Supreme Court has recognized a fundamental right to participate equally in the political process is erroneous.

A

In a long series of cases beginning with *Reynolds v. Sims*, 377 U.S. 533 (1964), the Supreme Court has held that there is a fundamental right to have one's vote counted equally. *See* 2 *Treatise on Constitutional Law* 15.7, at 435; *e.g., Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).[12] Traditionally, both

---

[12] The right to vote undoubtedly includes the right to participate in the *electoral* process by exercising the franchise. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("this Court has made clear that a citizen has a constitutionally protected *right to participate in elections* on an equal basis"); 2 *Treatise on Constitutional Law* § 15.7, at 435; *cf.* Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument*, 41 Fla. L. Rev. 443, 459 n.63 (1989) (characterizing the "right to participate in *elections* on an equal basis" as a fundamental right).

Neither the appellees nor the majority, however, contends that the right to participate in the *electoral* process is equivalent to the much more expansive right to participate in the *political* process. *See generally* Laurence H. Tribe, *American Constitutional Law* § 13-1, at 1062 (2d ed. 1988) (characterizing political participation rights as "rights poised between procedural due process and the freedoms of expression and association"). Nor does the majority assert that in this case Amendment 2 infringed on the appellees' fundamental right to vote.

Notably, in their general discussion of fundamental rights in their brief before the district court, the appellees mentioned only the fundamental right to vote (including the right to participate in the electoral process) and not the more expansive fundamental right upon which they sought the injunction. The appellees stated:
"The two branches of equal protection law are distinct. Rights considered 'fundamental' for equal protection purposes include the right to interstate

commentators and case book authors have characterized these decisions as recognizing a fundamental "right to vote" that is subject to the strict scrutiny standard of review. *See, e.g.*, John E. Nowak et al., *Constitutional Law*, ch. 16, I at 765-76 (2d ed. 1983); 3 *Treatise on Constitutional Law* 18.31, at 388-409; Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 Santa Clara L. Rev. 121, 150 (1989); James A. Kushner, *Substantive Equal Protection: The Rehnquist Court and the Fourth Tier of Judicial Review*, 53 Mo. L. Rev. 423, 429-33 (1988); David M. Treinman, *Equal Protection and Fundamental Rights--A Judicial Shell Game*, 15 Tulsa L.J. 183, 195-202 (1980); *see generally* Gerald Gunther, *Constitutional Law* 787-823 (11th ed. 1985); William B. Lockhart et al., *Constitutional Law: Cases-Comments-Questions* 1316-56 (6th ed. 1986); Ronald D. Rotunda, *Modern Constitutional Law* 598-613 (3d ed. 1989).

The majority recognizes that the decisions it cites involving reapportionment or direct restrictions on the exercise of the franchise are readily distinguishable from the present case. The reason that these cases are distinguishable is because they all involve the well-settled fundamental right to vote. *See, e.g., Kramer*, 395 U.S. at 627 ("if a challenged state statute grants the *right to vote* to some bona fide residents . . . and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest"); *Harper*, 383 U.S. at 667 ("the political franchise of *voting [is] a fundamental political right*"); *Reynolds*, 377 U.S. at 562 ("the right to exercise the franchise in a free and

---

travel (burdened by residency requirements); *the right to electoral participation, including the right to vote* (burdened by various qualifications and obstacles); the right of access to the courts (burdened by fees); and the right of privacy (burdened by laws affecting rights to procreation and family)."

By doing so, the appellees appear to concede that the fundamental right to participate in the political process has yet to be identified by the Supreme Court.

unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the *right of citizens to vote* must be carefully and meticulously scrutinized"); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("even the most basic [rights] are illusory if the *right to vote* is undermined").

As such, an extended analysis of these cases is not necessary to reach the conclusion that the Supreme Court decisions cited by the majority involving reapportionment or direct restrictions on the exercise of the franchise all fall within the jurisprudence addressing the fundamental right to vote and not within a broader-based fundamental right to participate equally in the political process. My conclusion is not only supported by the language quoted above, but also represents the traditional view of constitutional commentators and case book authors. *See* Nowak et al., *Constitutional Law*, at 765-76; 3 *Treatise on Constitutional Law* 18.31, at 388-409; *e.g.*, Gunther, *Constitutional Law*, at 787-823; Lockhart et al., *Constitutional Law*, at 1316-56; Rotunda, *Modern Constitutional Law*, at 598-613; Galloway, *Basic Equal Protection Analysis*, 29 Santa Clara L. Rev. at 150-52; Kushner, *Substantive Equal Protection*, 53 Mo. L. Rev. at 429-33; Treinman, *Equal Protection and Fundamental Rights--A Judicial Shell Game*, 15 Tulsa L.J. at 195-202.

The fact that the appellees initially claimed before the district court that Amendment 2 would infringe upon the fundamental right to vote, in addition to asserting that Amendment 2 would infringe upon the fundamental right to participate equally in the political process, further buttresses this conclusion. *See also supra* note 12 (recognizing the implicit acknowledgement of the appellees that the fundamental right to participate equally in the political process has not been identified as a fundamental right).

B

In addition to recognizing that any infringement on the fundamental right to vote is subject to the strict scrutiny standard of review under the Equal Protection Clause, the Supreme Court has concluded in a separate line of decisions that regulations involving ballot access may implicate the Equal Protection Clause. The Constitution does not contain any express provision that guarantees individuals the right to become a candidate, and the Supreme Court has never recognized a fundamental right of candidates to be listed on ballots. Nevertheless, the ballot access decisions indicate that heightened, although not strict, judicial scrutiny is required based on a combination of the fundamental right to vote and the First Amendment right of association. *See* 3 *Treatise on Constitutional Law* 18.32, at 411; Galloway, *Basic Equal Protection Analysis*, 29 Santa Clara L. Rev. at 152; *e.g.*, *Burdick v. Takushi*, 112 S. Ct. 2059 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

Admittedly, the Supreme Court has minimized the extent to which voting rights cases are distinguishable from ballot access cases, *Burdick*, 112 S. Ct. at 2065-66, and the early decisions within this category employed the strict scrutiny standard of review. *See Williams*, 393 U.S. at 30. Notably, however, the Supreme Court's more recent cases clearly indicate that the strict scrutiny standard of review does not apply to ballot access cases. *See Burdick*, 112 S. Ct. at 2060 (involving the open use of a balancing test); *Anderson*, 460 U.S. at 780 (same).

In *Burdick*, for example, the petitioner characterized the case as a right to vote case rather than as a ballot access case in an attempt to convince the Supreme Court that the strict scrutiny standard of review applied. *Burdick*, 112 S. Ct. at 2065. While recognizing the two different categories of case law, *Burdick* rejected the characterization of the case offered by the petitioner and specifically found that the strict scrutiny standard of review did not apply. *Id.* at

2066. Instead, *Burdick* applied the balancing test that the Supreme Court adopted in *Anderson*.

The decisions cited by the majority falling within the ballot-access category of cases address entirely distinct questions and constitutional problems from the present case and do not apply the strict scrutiny standard of review. As such, any unifying principle linking these cases with decisions from other equal protection categories, is, in my view, attenuated.

C

After citing language from particular equal protection decisions in the ballot access and right to vote contexts, the majority addresses the limited category of cases on which it principally relies as establishing explicit support for the recognition of a fundamental right to participate equally in the political process. *See* maj. op. at 20-28. According to the majority, the equal protection doctrine delineated in *Hunter v. Erickson*, 393 U.S. 385 (1969), and subsequently addressed in *James v. Valtierra*, 402 U.S. 137 (1971), *Gordon v. Lance*, 403 U.S. 1 (1971), and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), supports its conclusion that the Supreme Court has recognized a fundamental right to participate equally in the political process.

In my view, a careful reading of these four cases highlights the fact that they are not fundamental rights cases at all, but instead address potential violations of the Equal Protection Clause based on traditionally suspect classifications, albeit in situations where the ordinary political process has been restructured. *See Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648, 655 (Cal. App. 1991) (stating that "*Hunter* was a 'strict scrutiny' case in which the law invalidly classified the affected parties on the basis of traditionally suspect characteristics"); *cf.* Michael Klarman, *An*

Interpretative History of Modern Equal Protection, 90 Mich. L. Rev. 213, 314 (1991) (stating that "[i]n the place of political process theory, the Justices have inserted a very different notion of equal protection--that racial classifications are presumptively unconstitutional because race almost invariably *should be* irrelevant to governmental decisionmaking"); Robert H. Beinfield, Note, *The Hunter Doctrine: An Equal Protection Theory that Threatens Democracy*, 38 Vand. L. Rev. 397, 405 (1985) (concluding that racial classifications provided the basis for the heightened level of judicial scrutiny in *Hunter*).

In *Hunter*, the Supreme Court addressed a city charter amendment repealing a racial anti-discrimination ordinance and requiring voter approval before such an ordinance could be enacted. *Hunter*, 393 U.S. at 387. The Supreme Court initially concluded that it "need not rest on *Reitman* to decide" the case before it because "unlike *Reitman*, there was an explicitly racial classification [in *Hunter*]." *Id.* at 389.[13] Nevertheless, *Hunter* characterized the amendment as placing "special burdens on *racial minorities* within the governmental process," *id.* at 391 (emphasis added), and stated:

---

[13] *Hunter* did not state that it could not rely on *Reitman* which was decided the previous term, but rather suggested that it did not have to rely on *Reitman* to declare the statute unconstitutional. This conclusion is not surprising given that the cases involved completely different factual settings--one statute that embodied an explicitly racial classification (*Hunter*) and one that did not (*Reitman*).

Amici curiae in this case correctly point out that while *Reitman* plainly involved political participation issues, the Court analyzed it solely as a race case. It is somewhat difficult to explain why the Supreme Court would have relied exclusively on suspect classification grounds in *Reitman* when it could have struck down the statute based on the fundamental right that is today identified and embraced by the majority. In my view, the most logical explanation is that the Supreme Court simply did not recognize such a broad-based fundamental right. This explanation also accounts for the conspicuously superficial treatment that *Reitman* receives in the majority opinion.

> Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on *race, racial classifications are 'constitutionally suspect,'* and subject to the 'most rigid scrutiny.' They 'bear a far heavier burden of justification' than other classifications."

Id. at 391-92 (citations omitted) (emphasis added).[14]

Two years later, in *James*, 402 U.S. at 137, the Supreme Court was asked to apply *Hunter* in a case concerning the validity of a California constitutional measure prohibiting state public bodies from developing, constructing, or acquiring low-income housing projects until voters approved the project in a referendum. The federal district court relied on *Hunter* to find that the constitutional measure violated the Equal Protection Clause.

Under the broad reading of *Hunter* dictated by the majority, the federal district court's result should have been affirmed because the measure "involve[d] legislation which prevented the normal political institutions and processes from enacting particular legislation desired by an identifiable group of voters (*i.e.* poor people who would qualify for low-rent housing)." Maj. op. at 18. In its attempt to place boundaries on the expansive fundamental right that it recognizes, limiting language requiring "the presence of an *independently identifiable group* of voters" appears throughout the majority's analysis. *See* maj. op. at 14, 26, 27, 29, 31, 32, 35.[15]

---

[14] Subsequent federal cases addressing *Hunter* characterized the opinion as involving an unconstitutional racial classification. *See, e.g., Tyler v. Vickery*, 517 F.2d 1089, 1099 (5th Cir. 1975); *Lee v. Nyquist*, 318 F. Supp. 710, 718-20 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971).

[15] The basis for the limiting language seized upon by the majority is the Supreme Court's statement in *Gordon* that in contrast to *Hunter*, it could "discern no independently identifiable group or category that favors bonded

For example, the majority concludes that just as *Hunter* fenced out an independently identifiable group, so too does Amendment 2 expressly fence out the identifiable group of gay men, lesbians, and bisexuals. Maj. op. at 35.

Under the majority's analysis, the strict scrutiny standard of review therefore should have applied in *James* based on the fundamental right to participate equally in the political process, because *James* involved a group (poor people who would qualify for low-rent housing) that "was 'independently identifiable' apart from the group created by the statute itself." Maj. op. at 27. Just as "[t]he class singled out in *Hunter* was clear--'those who would benefit from laws barring racial, religious, or ancestral discriminations,'" *Gordon*, 403 U.S. at 5, the class singled out in *James* is equally clear--those who would benefit from local agency decisions providing for low-rent housing projects.[16]

---

indebtedness over other forms of financing." *Gordon*, 403 U.S. at 5. While the statement was certainly true in *Gordon*, it was also irrelevant to the equal protection analysis, as is evidenced by the fact that such language did not appear in *Hunter*, *James*, or *Washington*.

It is interesting, however, that the district court in this case also attempted to restrict the boundaries of the fundamental right not to have the state endorse and give effect to private biases by employing the same language.

[16] Similarly, just as Amendment 2 precludes gay men, lesbians, and bisexuals from "seeking governmental action favorable" to them, maj. op. at 36, and from enjoying the benefit of local provisions, so too did *James* preclude poor people who would benefit from low-rent housing from seeking governmental action favorable to them and from enjoying the benefit of previously adopted local agency decisions providing low-rent housing projects. Moreover, the constitutional measure adopted in *James* precluded poor people who would benefit from low-rent housing from employing the "normal political institutions and processes," maj. op. at 20, to seek low-rent housing projects by requiring the project to be approved by a majority of those voting at a community election. *James*, 392 U.S. at 138-39.

Despite these considerations, the Supreme Court did not apply the strict scrutiny standard of review. *James*, 402 U.S. at 143. Instead, *James* found that the strict scrutiny standard of review applied in *Hunter* not because a fundamental right existed and was infringed upon, but because the city charter amendment at issue in *Hunter* affected a traditionally suspect class:

> Unlike the case before us, *Hunter* rested on the conclusion that Akron's referendum law denied equal protection by placing "*special burdens on racial minorities* within the governmental process." . . . Unlike the Akron referendum provision, it cannot be said that California's Article XXXIV rests on "distinctions based on race." . . . The present case could be affirmed only by extending *Hunter*, and this we decline to do.

Id. at 140-41 (emphasis added). In this sense, I agree with the majority that *James* is "best understood" as a case where strict scrutiny analysis *did not apply* because the identifiable group challenging the constitutional measure was not recognized as a suspect classification, maj. op. at 28 n.21, and find *James* to be dispositive of the case before us.[17]

---

[17] Justice Marshall, joined by Justices Brennan and Blackmun, dissented in *James* on the basis that a suspect classification was involved. Justice Marshall concluded that the constitutional provision at issue was "an explicit classification on the basis of poverty--a suspect classification which demands exacting judicial scrutiny, see *McDonald v. Board of Election*, 394 U.S. 802, 807 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Douglas v. California, supra.*" *James*, 402 U.S. at 144-45. Justice Marshall's view has never been adopted by the Supreme Court.

In determining whether a group is a suspect or quasi-suspect class, the Supreme Court has identified several criteria to be used. *San Antonio Indep. School Dist.*, 411 U.S. at 1; *see also supra* note 7 (discussing the origin of "discrete and insular minorities" language in footnote 4 of *Carolene*

In explaining why the constitutional amendment at issue before it did not violate the Equal Protection Clause, however, *James* also cogently explained why *Hunter*, like *Reitman* before it, is "best understood" as a case where the strict scrutiny standard of review *did apply* because a traditionally suspect classification was involved. Before the Supreme Court, the appellees in *James* asserted that the mandatory referendum required by the constitutional amendment "hamper[ed] persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage." *James*, 402 U.S. at 142. In this way, an identifiable group was fenced out from the normal political processes. Nevertheless, the Supreme Court specifically rejected the assertion of the appellees that such a restructuring of the political process violated the Equal Protection Clause:

> [O]f course a lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to "disadvantage" any of the diverse and shifting groups that make up the American people.

Products). Among others, the Supreme Court has indicated that the immutability of a group's identifying trait should be considered. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *cf. Woodward*, 871 F.2d at 1076 (noting that "homosexuality, as a definitive trait, differs fundamentally from those defining recognized suspect or quasi-suspect classes").

Id. In my view, the rejection of the assertion of the appellees in *James* weakens, and all but forecloses, the broad reading of *Hunter* offered by the majority.

Less than two months after *James*, the Supreme Court in *Gordon*, 403 U.S. at 1, again distinguished *Hunter* by indicating that the reason the strict scrutiny standard of review was required in *Hunter* was because a traditionally suspect classification was involved. *Gordon* also involved a challenge by a group of interested citizens to a state's constitutional and statutory provisions, which in that case required a sixty-percent approval for any bonded indebtedness incurred by political subdivisions of the state. *Id.* at 2-3.

In rejecting the equal protection claim, *Gordon* stated:

> Unlike the restrictions in our previous cases, the West Virginia Constitution singles out *no "discrete and insular minority"* for special treatment. . . . We are not, therefore, presented with a case like *Hunter v. Erickson*, 393 U.S. 385 (1969), in which fair housing legislation alone was subject to an automatic referendum requirement. The class singled out in *Hunter* was clear--"those who would benefit from laws barring *racial, religious, or ancestral discriminations.*"

Id. at 5 (emphasis added). As in *James*, the strict scrutiny standard of review did not apply in *Gordon* because the group challenging the constitutional measure could not establish membership in a discrete and insular minority that the Supreme Court recognized as a suspect classification. In this sense, *Gordon* is also "best understood" as a

case where strict scrutiny analysis did not apply because a suspect classification was not involved.[18]

In *Washington*, 458 U.S. at 457, the Supreme Court for the first time struck down a statewide initiative based on *Hunter*. Because the initiative was drafted to terminate the use of mandatory busing to achieve racial integration in the Washington public school system, the Supreme Court found that it violated the Equal Protection Clause:

> [T]he political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process. State action of this kind, the Court said, "places *special* burdens on racial minorities within the governmental process," thereby "making it *more* difficult for certain racial and religious minorities than for other members of the community to achieve legislation that is in their interest."

Id. at 470 (citations omitted).

That *Washington*'s analysis was driven by the traditionally suspect classification involved in the case is further suggested by its

---

[18] The fact that *Gordon* could not discern any "independently identifiable group or category that favors bonded indebtedness over other forms of financing," while certainly true did not impact on the equal protection analysis. In *James*, where an identifiable group favoring low-income housing clearly existed, the Supreme Court nevertheless declined to apply strict scrutiny analysis because no traditionally suspect classification was involved. *See supra* note 17 and accompanying text.

reaffirmation of the principle of *Hunter* that meaningful and unjustified distinctions based on race are impermissible:

> When the political process or the decisionmaking mechanism used to *address* racially conscious legislation--and only such legislation--is singled out for peculiar and disadvantageous treatment, the governmental action plainly "rests on 'distinctions based on race.'" *James v. Valtierra*, 402 U.S., at 141, quoting *Hunter v. Erickson*, 393 U.S., at 391.

Id. at 485-86.[19]

The foregoing review of *Hunter* and its progeny highlights my conclusion that the Supreme Court has never focused on the

---

[19] My conclusion is further supported by *Crawford v. Board of Educ.*, 458 U.S. 527 (1982), a Supreme Court opinion announced the same day as *Washington* that involved a similar attempt by state voters to restrain busing plans. In *Crawford*, however, the Supreme Court upheld a state constitutional amendment providing that state courts could not order mandatory student assignment or transportation unless a federal court would do so to remedy a violation of the Equal Protection Clause. *Id.* at 529.

The petitioners asserted that the constitutional amendment fell within *Hunter* because it employed an "explicit racial classification" and imposed a "race-specific burden on minorities." *Id.* at 536. *Crawford* agreed that if the constitutional amendment employed a racial classification, the strict scrutiny standard of review would apply, but found *Hunter* inapplicable to the case before it because the amendment did "not embody a racial classification." *Id.* at 536-37. In this way, the constitutional amendment in *Crawford* differed from the amendment in *Washington* which embodied an explicit racial classification by reallocating decisionmaking authority in such a way as to make it more difficult for individuals to obtain legislation in their interest because of their race. *See* 3 *Treatise on Constitutional Law* § 18.9(3)(f), at 137; *The Supreme Court 1981 Term*, 96 Harv. L. Rev. 1, 120-30 (1982). The Supreme Court also stressed that having gone beyond the requirements of the Fourteenth Amendment, the state was free to return to the standards of the federal Constitution. *Crawford*, 458 U.S. at 542.

fundamental right of an independently identifiable group (*i.e.*, poor people who would benefit from low-income housing) to participate equally in the political process. Rather, each of the four cases specifically focuses attention "on the special *burdens on racial minorities* within the governmental process." *See Washington*, 458 U.S. at 458; *Gordon*, 403 U.S. at 5; *James*, 402 U.S. at 141; *Hunter*, 393 U.S. at 391. Because all four decisions were driven by traditional strict scrutiny analysis involving a suspect classification, the fact that the regulations at issue in each occurred within the context of the political process was not dispositive.

D

It is clear that language discussing citizen participation has appeared in a variety of contexts in Supreme Court equal protection opinions addressing the fundamental right to vote, ballot access, and suspect classifications. To date, however, the Supreme Court has never explicitly stated that a fundamental right to participate equally in the political process exists that is subject to the strict scrutiny standard of review. Nor has the Supreme Court found such a fundamental right within the penumbras of the Constitution. Therefore, I cannot agree with the majority's underlying legal premise that the Supreme Court has recognized such a fundamental right to support the strict scrutiny standard of review in this case.[20]

---

[20] The majority's underlying premise that Amendment 2 violates a fundamental right to participate equally in the political process is also difficult to reconcile with the constitutional and statutory provisions of twenty-one states denying individuals convicted of certain crimes, even if the individual is no longer incarcerated, from being elected to, or from holding public office. *See* Steven B. Snyder, *Let My People Run: The Rights of Voters and Candidates Under State Laws Barring Felons from Holding Elective Office*, 4 J.L. & Pol. 453 app. A (1988) (listing jurisdictions that specifically disqualify ex-felons from holding public office).

In my view, rather than expressing a willingness to extrapolate new fundamental rights based on selective language from prior Supreme Court decisions, we should exercise caution in identifying and embracing previously unrecognized fundamental rights. *See Bowers*, 478 U.S. at 194-95 (stating that "there should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental"); *Dronenburg*, 741 F.2d at 1396 (stating that "[i]f it is in any degree doubtful that the Supreme Court should freely create new constitutional rights, we think it certain that lower courts should not do so").

At some point in the future, the Supreme Court may agree with the majority's underlying legal premise and identify such an expansive fundamental right to participate equally in the political process. Such a substantive due process decision would most likely conduct an analysis similar to previous Supreme Court decisions and address the importance of the right, relevant Constitutional provisions, the history and traditions of our country, and whether the right is implicit in the concept of ordered liberty. The fact that such analysis is not present in the Supreme Court precedent cited by the majority cautions against the recognition of such a fundamental right.

I am also troubled by the broad reading given to the Supreme Court cases relied upon by the majority because it is contrary to the underlying principles of *Oregon v. Hass*, 420 U.S. 714, 719 (1975). Under *Hass*, a state court cannot impose a restriction as a matter of federal constitutional law that the Supreme Court has specifically

---

It is hard to imagine any greater form of participation in the political process than serving as an elected or appointed public official. Nonetheless, twenty-one states completely deny this aspect of political participation to the independently identifiable group of previously convicted felons. Notably, none of these provisions have been struck down based on an equal protection challenge for infringing on a fundamental right to participate equally in the political process.

refrained from adopting. *Id.* In *James*, the Supreme Court confronted an equal protection challenge by an identifiable group of persons who had been fenced out by the majority's alteration of their access to the political process. Because *James* explicitly refrained from extending *Hunter* to declare a fundamental right to participate equally in the political process when it rejected the appellees' assertion in that case, we are constrained by the principles of *Hass* from doing so now. *See People v. Cisneros*, No. 91SC467, 1993 WL 242337, at *9 (Colo. July 6, 1993) (Erickson, J., concurring) (citing *Hass*, 420 U.S. at 719); *see also DiLeo v. Board of Regents*, 590 P.2d 486, 491 (Colo. 1978) (Erickson, J., dissenting) (only the United States Supreme Court can pronounce the final word on whether the strict scrutiny standard of review or the rational basis standard of review applies). Rather, a straightforward application of *James* indicates that the strict scrutiny standard of review does not apply in this case.

IV

In my view, the district court's underlying legal premise that the Supreme Court has recognized a fundamental right not to have the State endorse and give effect to private biases is erroneous. Similarly, the majority's underlying legal premise that the Supreme Court has recognized a fundamental right to participate equally in the political process is erroneous. Because Supreme Court precedent does not support the evaluation of Amendment 2 under the strict scrutiny standard of review, I would reverse and discharge the entry of the preliminary injunction, and remand for trial on the permanent injunction.

APPENDIX B

DISTRICT COURT, COUNTY OF DENVER , STATE OF COLORADO

Case No. 92 CV 7223, Courtroom 19

REPORTER'S TRANSCRIPT

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN,
MARTINA NAVRATILOVA, BRET TANBERG, PRISCILLA INKPEN, THE CITY
AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN,
and THE CITY COUNCIL OF ASPEN,

Plaintiffs,

v.

ROY ROMER as Governor of the State of Colorado and GAIL NORTON as Attorney General of the State of Colorado,

Defendants.

The hearing in this matter commenced on Friday, January 15, 1993, before the HONORABLE H. JEFFREY BAYLESS, Judge of the District Court.

FOR THE PLAINTIFFS: Ms. Jean E. Dubofsky, Esq.
Ms. Jeanne Winer, Esq.
Ms. Gregory A. Eurich, Esq.
Ms. Darlene M. Ebert, Esq.
Mr. Edward M. Caswall, Esq.
Mr. Joseph N. DeRaismes, Esq.
Mr. David H. Miller Esq.
Ms. Jane W. Greenfield, Esq.

FOR THE DEFENDANTS: Mr. Timothy M. Tymkovich, Esq.
Mr. John Daniel Dailey, Esq.
Mr. Terrence A. Gillespie, Esq.
Mr. Gregg E. Kay, Esq.
Mr. Mark W. Gerganoff, Esq.
Mr. Jack Wesoky, Esq.

AFTERNOON SESSION, FRIDAY, JANUARY 15, 1993

(The following proceedings were had and entered of record:)

THE COURT: The Court calls 92 CV 7223, Richard Evans, et al, versus Roy Romer, et al.

The record will reflect the appearance of counsel who have been here throughout the week during the presentation of evidence. The matter comes on at this time for the Court to enter its ruling on the two motions for preliminary injunction which have been filed first by the individual plaintiffs in this case and then by the home rule City of Aspen.

The Court is prepared to rule and is going to rule at this time. Before I do that, I want to talk about a couple of things that aren't part of the ruling. Yesterday there was an outburst in the court which the Court felt was inappropriate to the decorum that I want to maintain. And I said so.

Now, in a minute I'm going to rule, and one side is going to perceive that they have won something, and the other side is going to perceive that they have lost something. And that might generate some emotions. And I understand that. As a matter of fact, I suspect there are strong emotions on both sides. And for those who perceive that they have won something, they may want to celebrate. For those who perceive they have lost something, they might want to express disagreement with that, and that's inappropriate in court. I didn't want it yesterday, I don't want it today. But having told everybody what I want, I'm satisfied that this group will abide by the Court's request and maintain the decorum that's appropriate for a courtroom.

Now, the second thing I want to tell you, I decided this about 2:30 this morning. Since that time, with about four hours out to sleep, I have been writing. And what I've attempted to do is to understand and have my ruling reflect that I know the audience to whom I'm speaking. And I think the audience is made up of two distinct groups. One is a group of legally trained people. That is to say, counsel who have presented this, counsel who have been perhaps inside the bar who may not have presented evidence, and they are familiar with the case law, and they are familiar with the legal concepts, and there will be catch phrases and legal expressions, code I talk in, and they'll understand that. And so a part of it is written for them.

And both sides have told me very fairly, not at this hearing but before, that they anticipate that regardless of what I do, there might be another day and in another higher appellate court that something might be reviewed. So I have written for that audience as well. But I am aware of the interests in this case and the interests in this decision from non-legally trained folks, just the people of Colorado who voted on the Amendment. So what I have attempted to do in writing this is to write at two levels. One for the lawyers and one for the non-lawyers. And I hope not to insult either. And I hope to be clear to both. How well I have succeeded in that will be determined by someone other than me.

Having said those two things, the Court rules as follows: Our form of government is a constitutional democracy, and both of those words have significance. "Constitutional" means our form of government is established by the United States Constitution and by the Colorado Constitution. "Democracy" means what most people think it means, that in most cases the majority rules. Now, let's talk a little bit about that. Historically, the United States Constitution would not have been ratified, if you remember your history classes, unless there had been included the first ten amendments, the Bill of Rights. And the states wouldn't have adopted it without that. So that's how the first ten got there.

Now, in Colorado, for those of you who aren't immediately familiar with our Constitution, it is physically difference in appearance than the United States Constitution. Let me tell you about that. The Bill of Rights to the Colorado Constitution is not a set of amendments. As a matter of fact, the Bill of Rights is right in the body. It is Article II of the Colorado Constitution. Article I is a one-paragraph geographic description. It says the boundaries of the state start here, and go like this.

The first matter of substance then that is addressed after defining the boundaries is the Bill of Rights in our Constitution. Now, I take that to mean that in Colorado, rights come first. Section 1 of Article II of the Bill of Rights sets out that all political power in Colorado is vested in and derived from people. Section 2 says the people of this state have the sole and exclusive right of governing themselves as free -- as a free, sovereign, and independent state. And to alter and abolish their Constitution and form of government whenever they may deem it necessary to their safety and happiness, provided such change be not repugnant to the Constitution of the United States.

What that says is the majority of citizens can alter the Constitution, it can change. And we have had 29 parts to that Constitution. There are 29 existing articles to Amendment 2 that are

the Bill of Rights in Colorado. But in amending that and altering the form of government, even a majority vote of the Colorado citizens cannot violate the constitutional rights of other Colorado citizens.

Now, the issue in question here [illegible] is hearing relates to Article II Section 2 of the Colorado Constitution. And it relates to the amendment of that Constitution, the alteration of the State's Constitution by the addition of what was called Amendment 2. Amendment 2 is scheduled actually to become Section 30 of the Bill of Rights here in Colorado. The question raised by the lawsuit asked the court of Colorado whether this amendment violates Article II Section 2 of the Bill of Rights by virtue of being repugnant to the Constitution of the United States. The courts of Colorado are one of the three branches of government under Article III of the Colorado Constitution and are charged with interpreting the Constitution and the laws of the state of Colorado.

Now, the first part of this case is the part we have done this week. And it does not address, and the Court today is not addressing the merits of this case. What will be the final determination will be for another day for full presentation of evidence, full briefing, and full argument. This first part deals with only asking the Court to delay the effective date of the Amendment until such time as that final determination can be made. Such a request is proper, and as a matter of fact, is provided for under the Rules of Civil Procedure, specifically Rule 65 here in Colorado which allows for preliminary injunctions.

Now, an injunction is a court order which may stop something from happening within a state. This Court is not allowed to base its ruling on a preliminary injunction on its own personal views. Rather, the oath of all Colorado Judges is to support the Constitutions of both United States and of the State of Colorado. And in dealing specifically with preliminary injunctions, the Supreme Court of Colorado has spoken very clearly as to what trial courts are

to view in making their decision as to whether injunctions should issue.

I started on Monday, when I introduced this case, by making reference to that case. It's called *Rathke versus MacFarlane*. And if you were here yesterday, you saw that counsel pitched their arguments in terms of the *Rathke versus MacFarlane* standard. That case tells me several things. Let me just brief them. It says, first, that the granting or denial of a preliminary injunction rests in the discretion of the trial court. But then it talks to the trial court as to how it should exercise that discretion. It says these injunctions should not be indiscriminately granted. It says they should only be granted sparingly and cautiously, with the full conviction on the part of the trial court that there is an urgent necessity for the injunction.

Now, the urgent necessity is described by our Colorado Supreme Court as being a threshold. That is to say, if the urgent necessity is not found, the Court doesn't weigh the other six factors. It then says if the threshold, however, is established, then the Court has to weight the six factors that have been discussed. First, that the side seeking the injunction has a reasonable probability of winning the case on the merits.

Now, this calls, admittedly, for some degree of forecast or prediction by the Court as to what may occur in the future. And the Supreme Court recognizes that that's a part of it. Second, it says the Court must consider whether there's a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief. Irreparable injury is defined as injury that cannot be fixed or repaired or adequately compensated perhaps by money.

Third, the Court has to weigh whether or not there is a plain, speedy, and adequate remedy at law, should the preliminary injunction not be granted. Fourth, the Court must weigh whether granting preliminary injunction will or will not disserve the public interest. Fifth, the Court is directed to address the balance of equities

and see if they favor the injunction. Sixth, the Court is directed to consider whether the injunction will preserve the status quo, preserve what exists now, pending a trial on the merits of the case so that things will stay the same. And then the Supreme Court says you can't prove five or four, you have to prove all six. So that's what we are talking about here today, and that is the area in which the Court must base its ruling.

The plaintiffs are individuals and three home rule cities who have asked the Court to delay the effective date. So it is they who bear the burden of proving these things established by *Rathke versus MacFarlane*. They must show the threshold of urgent necessity, and then they must show to the satisfaction of the Court these other six things that have been discussed.

In large measure, the proof which has been offered has been focused on their position that Amendment 2 is repugnant to the United States Constitution. They argue that there's a urgent necessity because of the probability of persons having their fundamental constitutional rights violated for any time period creates an urgent necessity. They argue that the violation of these fundamental constitutional rights causes irreparable harm, and so on, through the six that I have to weigh.

The first one, and perhaps the one that most of the attention has been based on is whether -- has been focused on, rather, is whether there's a reasonable probability of success on the merits. Plaintiffs are attacking the part of the Constitution of the State of Colorado which was passed by a majority vote of the voters November 3, 1992. Because it is a part of the Constitution, they must prove at the final hearing in order to prevail that this Amendment is unconstitutional beyond a reasonable doubt.

Several cases have said it that that's the standard, including *Rathke versus MacFarlane*. That's the highest standard we have in Colorado. That's the same standard as a jury would be asked to

consider if someone is guilty of murder in the first degree. Reasonable doubt in Colorado means a doubt based upon reason and common sense which arises from a fair and thoughtful consideration of all of the evidence or the lack of evidence in the case. It is not a vague, speculative, or imaginary doubt, but it is such a doubt as would cause reasonable persons to hesitate to act in matters of importance to themselves. And so at the hearing on the merits, they will have the burden of proving it beyond such reasonable doubt.

Plaintiffs argue that this Amendment deprives them of fundamental rights guaranteed by the U.S. Constitution. They do not argue that there is a fundamental right to be homosexual or bisexual or lesbian, which is found in the U.S. Constitution. Rather, they argue that the rights they are deprived of are found in the right to equal protection of the laws under the First and 14th Amendments to the United States Constitution.

Specifically, plaintiffs argue that they will be denied the right to vote and the right to petition the government for redress of grievances by the right to have access to the courts. What does the Amendment say? We have had the Amendment on the podium from time to time here. It says, "Neither the state of Colorado through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities, or school districts shall enact, adopt or enforce any statute, regulation, ordinance, or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status, or claim of discrimination. This section of the Constitution shall be self-executing."

Plaintiffs produced evidence that the Amendment was only addressed to claim of discrimination by homosexuals, lesbians, and bisexuals. They did this by the testimony of witnesses who came before this Court and announced, self-declared, if you will, that they were homosexual. And then by saying that neither they or anyone

that they knew who were also homosexual are seeking to establish any minority status or quota preference or protected status.

By doing this, the plaintiffs have attempted to narrow the focus to the claim of discrimination based on homosexual, bisexual, or lesbian orientation. They therefore urge that the Amendment actually and only stands for the proposition in Colorado by Constitutional Amendment is now about to say that there will be no remedy available for acts of discrimination against homosexuals, bisexuals, and lesbians because those people alone may not go to the government to ask for laws to be enacted or existing laws to be enforced which would prevent that discrimination.

They then point out both by testimony and exhibits that there are existing laws. And they pointed specifically to Section 10-3-1104 having to do with insurance. And that says insurance companies may not discriminate in issuing insurance policies based on sexual orientation. They point out that the executive department has an existing order by virtue of the Governor's Executive Order of December 10, of 1990, which prohibits discrimination based on sexual orientation. They point out from the testimony of the representatives of the home rule cities that these cities may not enact ordinances which may grant remedies for discrimination based on these particular orientations. And they further point out that the three cities which have such ordinances at the present time will be forbidden to enforce them if Amendment 2 becomes effective.

They urge that school districts may not be allowed to remedy any discrimination as to faculty employees or students based on discrimination for homosexuality, bisexuality, or lesbians. In short, the plaintiffs urge that this Amendment, by denying the opportunity to obtain a remedy for discrimination based upon these orientations, has identified a specific group and said that any discrimination as to that group because of membership in that group may not be given relief or remedy by the agencies of the state of Colorado.

It has not said that the state will discriminate against homosexuals, bisexuals, or lesbians, but it has said if any private citizen does discriminate based on such orientation, that no remedy may be provided by the State. Plaintiffs argue this Amendment endorses and gives State-approval as to private discrimination.

Plaintiffs argue that such a State statement endorsing and approving private discrimination deprives them of the right to vote and the right to approach their government; specifically, their courts, for a redress of greivances.

Plaintiffs offer much case authority in support of their position. Many cases from the United States Supreme Court. Such law is received and followed where appropriately applicable by Colorado courts from the United States Supreme Court. Plaintiffs offer several other cases which are not controlling in Colorado. For example, they offer cases from other states. California, for instance, and from federal courts which are not Supreme Court. That's proper. There's nothing improper about that. They are not saying it is controlling here. They are saying please read this and please review this, we believe there is wisdom to be gained which Colorado might wish to adopt.

Their lead case and where they began, and this was highlighted in the closing argument yesterday, is *Reitman versus Mulkey*. That case involved a question of race in the sale or leasing of rental property.

Let's turn now to the defendants. The defendants, quite rightly, point out that the majority of cases offered by the plaintiffs deal with race, as does *Reitman versus Mulkey*, and not with questions of sexual orientation. The Court notes that defendants are right. That's correct. But the Court also notes it wasn't very surprised by that. And the reason it wasn't very surprised by that is because the history of discrimination law in the United States is based on race. It started with the 14th Amendment which talked about slavery. And

most, I will say, of the law has dealt then with the history of discrimination. And so most of these cases do talk about race. Race has a very special place in our legal history. And I think it may well have a small place here.

There has been a suggestion that as a part of Defendant's Exhibit C, one of the things that concerned those proponents of Amendment 2 was that there was urged in one jurisdiction in Colorado that a certain quote preference be given to those with homosexual/bisexual orientation. It was never adopted, but they suggested that perhaps that is what is being addressed by t e quota preference which is a part of Amendment 2.

Now, defendants are allowed to present evidence, and defendants are allowed to argue. And they have done both here. But *Rathke versus MacFarlane* does not place any burden of proving anything on the defendants. The burden is always with the plaintiffs who are seeking the injunction. Now, in addition to not having to prove anything here, the defendants have the benefit of something else. Legislation in this case, this is a piece of initiated legislation that will become a part of the Colorado Constitution, is entitled to something called a presumption of constitutionality, and the Court understands that and gives to that statute a presumption of constitutionality.

That is not to say that the presumption may not be overcome by the presentation of evidence, but the defendants start with that presumption. Defendants then well and fairly argue there are several things here that have been discussed that have been presented that they strongly urge are not part of the case. Mr. Dailey did this very well, really, at the upfront part of his argument yesterday. He said Coloradans for Family Values isn't a party here. He said the Religious Right isn't a party here, nor the Political Right, nor whether Colorado could be deemed a hate state. That's not here, Judge. That's not what you are to decide. And the defendants are correct, and the Court accepts that.

As a matter of fact, I looked at what was presented to the Court in terms of the efforts that have been made on the part of Coloradans for Family Values and the Religious Right and the Political Right. And what I saw was a group of Colorado citizens who wanted to present an initiative to the voters. They said we would like the voters of Colorado to look at this. So they acquired signatures. They presented things to the state government. They followed the political process, and they got it on the ballot. And they lobbied for or were part of a lobbying effort for the passage of the Amendment, and that involved spending money and presenting their views.

There is absolutely nothing wrong with that. As a matter of fact, that is exactly in keeping with the political process that this country is based on. And this Court, should there be an attack on that process, would vigorously defend those persons who have been involved with that process, because they have followed exactly what democracy urges. As a matter of fact, at every election, what you hear is to the voters, "Get involved. Go to your caucuses. Vote." That's exactly what they have done. There's nothing suspect about that.

The focus of the defendant's argument was that this is not unconstitutional because all the Amendment attempts to do is to make a part of Colorado law that which is existing in the federal law in terms of the treatment of homosexuals, lesbians, bisexuals. The argument goes on that the courts should not look to the limitation placed by plaintiffs just on the discrimination but rather look to the whole Amendment. And they urge that because that demonstrates the true intent of the Amendment. If you isolate on one part, you may not be viewing the true intent and that the Courts should look to the ballot analysis as a type of legislative history, if you will, to demonstrate what that intent was.

The defendants also argue, and they cite the same way, U.S. Supreme Court cases and cases from other courts. They start with

Bowers versus Hardwick, and they urge that gay, lesbian, and bisexual conduct has been held -- "conduct," now, has been held to be criminal in some states. That case involved a statute outlawing sodomy. And that statute was sustained in *Bowers versus Hardwick* by the United States Supreme Court. And they urge that this behavior which can be criminalized defines the class of people here.

They also argue that a law-making procedure that disadvantages a particular group does not always violate constitutional rights or deny equal protection, and they cite Supreme Court case law for that. The Court agrees with that general statement of the law. They say there is no necessity for the Court to intrude on the private and moral values of citizens, and that is what is the heart of Amendment 2.

They urge then that the Court distinguish between certain standards or measures or tests, if you will, as to how you -- how the Court should view an attack on constitutionality. They say this should not be viewed under what is described as the strict scrutiny test but only should be described or analyzed under what's called the rational basis test.

There are the positions which have been taken in summary form by the two sides here. The question is what is the Court to do. First, the Court is ruling on a motion for preliminary injunction only. I am not ruling on the constitutionality of Amendment 2. As a matter of fact, the Court may not at this time rule on the constitutionality of Amendment 2. I may only rule on what is before me, the motion for preliminary injunction.

Second, in ruling, I am following the guidelines that I have outlined from *Rathke versus MacFarlane*. The Court's view is this: In large measure, everything revolves around the first of the six claims. That is -- first of the six elements, excuse me, as to whether plaintiffs have shown evidence and made argument that leads this Court to conclude that they have a reasonable probability of proving

that Amendment 2 is unconstitutional beyond a reasonable doubt at a hearing on the merits.

Now, some of the six parts are easier to answer on that score than others. For example, the last one is the easiest. Will an injunction preserve the status quo? Yes, of course. Amendment 2 has never been a part of the law of Colorado. It is not now. An injunction will preserve exactly that status. The voters have voted on it. The Secretary of State has certified the vote totals. An injunction will preserve exactly that status.

The others tend to be related to that question that the Court has identified. Is there a danger of real, immediate, and irreparable harm if Amendment 2 becomes effective? Well, if the Court determines that this would be a denial of fundamental constitutional rights, then any denial of fundamental constitutional rights would be real, immediate, and irreparable harm.

Keep in mind w[illegible] I started. Rights come first in the Colorado Constitution. Bill of Rights is first. The question relates to whether Amendment 2 amounts to a denial of a constitutional fundamental right. Is there a plain, speedy, and adequate remedy at law? Well, once again, it's related to is this probably to be shown to be unconstitutional? The only discussion of potential remedy has been that someone could pass an amendment which repeals Amendment 2. That is a plain remedy. Plain isn't enough. Is it speedy? Clearly not.

There would have to be some effort to get that sort of an amendment on a ballot by legislative action or initiative. Then there would have to be the election process. There's a plain remedy, but it is clearly not speedy. But it does relate, once again, as I have mentioned to whether or not this is a violation of fundamental constitutional rights, or that they have shown that they have a reasonable probability of succeeding on the merits.

Will the granting of a preliminary injunction serve or disserve the public interest? It's tied to whether or not they have established whether they may or may not prevail. The Court finds that the public has no interest whatsoever in having an unconstitutional amendment be added to its Constitution. By the same token, or, if you will, on the other hand, the State has every interest in having a constitutional amendment become effective if it is not unconstitutional because a majority of the voters voted for it.

Does the balance of equities favor the injunction? It goes back to the same question. Is there an urgent necessity? The urgent necessity is once again tied to whether or not they are liable to prevail. Therefore, the Court concludes that in or order to answer the question as to whether plaintiffs have established the reasonable probability of success, reasonable probability that they will prove this is unconstitutional beyond a reasonable doubt will determine the matter.

What is the state of the law in this Court's view regarding constitutionality of such an amendment? It has been mentioned that the law is not static. It has been mentioned that it evolves. It grows. It changes. And that is true. I'm going to borrow a few words from some Justices of the Supreme Court. It's not about these cases. Not about sexual orientation. It's about the law. It's about the law growing and changing, because I want to put this in a context. Quoting from Mr. Justice McKenna in a case called *Weems versus the United States* from a long time ago, 1910. He said, "The clause of the Constitution in the opinion of the learned commentators may be, therefore, progressive and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."

I want to quote from Chief Justice Earl Warren in a 1958 case called *Trop versus Dulles*. He was discussing the 8th Amendment, that's cruel and unusual punishment. It says, "The words of the 8th Amendment are not precise and their scope is not static. The

Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

What is the law on discrimination? What has it been? As I mentioned it started with the 14th Amendment which was for former slaves. It relates to blacks. It related to race. It has been largely dominated by racial cases. The evolution has developed some legal standards, and they were argued yesterday, and I'm going to now discuss those.

One, is that a violation which involves something -- violation of a fundamental right which involves something called a suspect class or a violation which involves a suspect class, even if it's not a fundamental right, calls for strict scrutiny by the Court. It's not here. Plaintiffs haven't argued it. It's not for the Court to determine. Go on to the next.

A second involves what are described as equal protection violations of fundamental rights. What are fundamental rights? There have been a lot of cases that have discussed those. Fundamental rights have been deemed to include the right to participation in elections. The right of access to the courts. Right of privacy. And even the right of interstate travel. In terms of this issue, the laws which may burden fundamental rights of an independently identifiable group are subject to what is called strict scrutiny of the courts under this equal protection analysis.

That's where the plaintiffs urge the Court ought to come down. Those two prongs. This is a fundamental freedom. This is an independently identifiable group. And therefore, the Court must view this under the strict scrutiny standard. What does that mean? That means a law which burdens any of these fundamental rights of this independently identifiable group will require the state now to show and have a burden that this measure is necessarily related to a compelling governmental interest.

So it changes. They have had all the burden here, but if it were a strict scrutiny standard at the time of hearing on the merits, there would be two standards. One on this side of the room and one on that side of the room. And plaintiffs urge that is the standard I should apply.

The third standard which has been urged in part at least by the defense is called the rational basis test. And that involves laws which may involve not fundamental rights but may be something that's deemed non-fundamental rights in the Constitution, and they are subject only to the test of rational basis. That is to say, the Court is to defer to the legislation if there is any rational relationship between a legitimate public goal to be accomplished and the lines drawn which may accomplish that, even though those lines in the legislation may amount to some degree of discrimination.

The Court concludes with regard to the first that there is a fundamental freedom involved with Amendment 2. The parties themselves have struggled to identify the fundamental freedom. The reason they have struggled, I think, is because they have tried to cast it in the words of prior cases. Let me read you some of those words. I'm going to read you some quotes, and that's always a question as to whether anybody ought to do this, but you have to understand where the Court is coming from because of the law that has come before it.

The first case that the plaintiffs cited is called *Reitman versus Mulkey*. And it was a California case. You haven't read it, but it involved a Section 26 that they passed out there, and it said if you own a piece of property, you can decide if you want to sell it or lease it to anybody, and it's you own decision. That's all it said. The Court said private discriminations in housing were now not only free from prior statutory enactments, but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds was now embodied in the State's basic charter, immune from

legislative, executive, or judicial regulation at any level of state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke constitutional authority, from from sensor or interference of any kind from official sources.

The Court in 1967 by a five to four vote, there are nine justices on the United States Supreme Court, said that was unconstitutional. That involved a fundamental right because what it did was it took this private discrimination and it gave state support to it. But it was five to four in 1967. That means the majority said, yes, and it was the law of the land.

But what happens if we change the members of the Supreme Court? I've told you the law evolves. So let's come forward from 1967. In 1984 there was a Supreme Court case which has been urged to the Court by both sides, as a matter of fact, called *Palmore versus Sidoti*. I don't know if that's how you pronounce it. That's how it looks. This time it was a unanimous decision, nine-zero. And it didn't involve real estate at all. It involved child custody. And the facts of that were that two people who were Anglo had been married, and they had a baby. And then they got a divorce. And in the divorce, custody of the baby was awarded to the mother. And the mother, who was an Anglo, then took up with a black man. And they ultimately married. And the father who was Anglo went for a change of custody. And basically, the change of custody said my daughter is white, and she will be victimized because there will be bias focused on her because the two people she's living with are of a mixed marriage. One white, one black. That's the context.

The Supreme Court said the question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. Seventeen years before the vote had been five to four. This time it's unanimous. And the Supreme Court says we have little difficulty concluding we are not -- and then it

gives a footnote. Sometimes a lot of law is contained in the footnotes, and the footnote says, "In light of our holding based on the equal protection clause, we need not reach or resolve petitioner's claim based on the 14th Amendments of due process clause."

So they are ruling on equal protection which is being raised here. The Court then goes on to say the Constitution cannot control such prejudices. That is, private prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot directly or indirectly give them effect.

Two years ago in 1991, there was a case which was not from the Supreme Court, it's been urged -- as a matter of fact, it was urged in closing argument by defense. It's called *Pruitt versus Cheney*. Different set of facts. A lesbian was an officer in the Army Reserve. She made a statement which was printed in the Los Angeles Press that said, "I am a lesbian." Based upon that, she was thrown out of the military. They have a regulation, an Army regulation that says they can do that. She brought suit to say that's unconstitutional. And she brought it because she said it's a violation of my right to freedom of speech. The only reason I was thrown out is because I spoke and it got printed in the paper. That's why you threw me out. Not because I'm homosexual.

The Court said no, you were thrown out because of the Army regulation because you are a homosexual, and that had been her claim. But then the Court incredibly said your claim was for violation of First Amendment but you stated facts which may arise -- may amount to a violation of the equal protection clause, and even though you didn't raise it by stating the theory, we are going to let you proceed on that theory which you didn't state. An incredible swing.

It cited the *Palmore* case I just read to you. In *Palmore*, the Supreme Court struck down a denial of custody of a child, based on social disapproval of the interracial marriage, of her daughter. In so

ruling, the Court said the Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot directly or indirectly give them effect.

Then it went on to say, *Cleburne*, which is another case, made clear that this principle is not confined to instances of racial discrimination reviewed under strict scrutiny. *Cleburne* was a case of zoning, basically. And it was whether you could put a group home for mentally retarded people within a certain area. And in *Cleburne*, the Court said it is plain that the electorate as a whole, either by referendum or otherwise, could not order city action violative of the equal protection clause.

And then they cite a case called *Lucas versus 44th General Assembly of Colorado*. It's a Supreme Court case. And the city may not avoid the strictures of that clause by deferring to the wishes or objections of some fraction of the bodied politic, and quote *Palmore*, the same language I have quote before.

So the first part has been established, the Court concludes. There is a fundamental right here, and it's the right not to have the State endorse and give effect to private biases.

Second question, is there an identifiable class? Yes. Lot of these cases says it's real hard to find an identifiable class. Not here. The statute itself, the Amendment 2 defines the identifiable class. A lot of these cases say even though it is facially neutral; that is to say, you can sell your property to anybody you want or not sell it to anybody you don't want, this isn't facially neutral. This identifies the class right in the Amendment.

So I find that there is an identifiable class. Now, with regard to the idea that's been argued by defendants that you can't make this an identifiable class because of *Bowers versus Hardwick*, the Court concludes that this is principally, although, the term "conduct"

appears in there, this is principally an Amendment which addresses status, not conduct. Conduct is what *Bowers versus Hardwick* said.

I do that based on a case which was not cited by either side. It's called *Robinson versus California*. That case is a Supreme Court case. That case said you can't make a status a crime even though the conduct is a crime. It had to do with drugs. Can you prevent -- can you say it's a crime to possess drugs? Yeah. Sell them? Yeah. Can you say it's a crime to be addicted to drugs. That's the status. And they said no.

The Court finds that this is a status. Therefore, the Court finds that the burden at the hearing on the merits is going to be twofold. One, the plaintiffs must prove the unconstitutionality of this beyond a reasonable doubt. But two, the Court will look at this under the strict scrutiny standard. And therefore, the State will have to show more than a mere rational basis. They will have to show a substantial and compelling government interest in passing this.

There will be a trial on the merits. The amendment will be reviewed as though it is one involving a fundamental right as affecting an identifiable class. That requires strict scrutiny and the two burdens. This will take place in light of what Justice Warren said, "The evolving standards of decency that mark the progress of a maturing society."

Will the plaintiffs win? The Court does not know. Do the plaintiffs have a reasonable probability, given all of this, given all of the law that the Court has examined, do they have a reasonable probability of proving that Amendment 2 is unconstitutional beyond a reasonable doubt? Yes.

The burdens of *Rathke* have been carried and met by the plaintiffs. The motions for preliminary injunction are granted, and the defendants -- the defendants, the Governor of the State of Colorado and the Attorney General of the State of Colorado are

enjoined from declaring Amendment 2 in force, and are enjoined from enforcing Amendment 2 until further order of Court.

This Court is in recess.

(The proceedings were concluded.)

REPORTER'S CERTIFICATE

The above and foregoing is a true and complete transcription of my stenotype notes taken in my capacity as Official Reporter for Division 19, District Court, Denver, Colorado, at the place above set forth.

Dated at Denver, Colorado, January 22, 1993.

_____

Karen Ann Shain, RPR, CSR

AMENDMENT 2 – CONSTITUTIONAL AMENDMENT INITIATED BY PETITION

No Protected Status

Ballot Title: *An amendment to Article II of the Colorado Constitution to prohibit the state of Colorado and any of its political subdivisions from adopting or enforcing any law or policy which provides that homosexual, lesbian, or bisexual orientation, conduct, or relationships constitutes or entitles a person to claim any minority or protected status, quota preferences, or discrimination.**

Provisions of the Proposed Constitutional Amendment

The proposed amendment to the Colorado Constitution would:

-- prohibit the state, its branches or departments, or any of its agencies, political subdivisions, municipalities, and school districts from adopting or enforcing any law or policy that entitles any person to claim discrimination, protected status, minority status, or quota preferences based on homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships; and

-- make all existing anti-discrimination ordinances, laws, regulations, and policies prohibiting discrimination based on an individual's homosexual, lesbian, or bisexual orientation unenforceable and unconstitutional.

Definitions

For the purposes of this analysis, the following terms have the given meanings:

-- "**Civil rights laws**" refers to local, state, and federal laws designed to protect classes of persons from discrimination in areas such as employment, housing, and public accommodations.

-- "**Constitutional rights**" refers to the guarantees contained in the federal Bill of Rights (first ten amendments to the United States Constitution) and made applicable to the states through the Fourteenth Amendment.

-- "**Discrimination**" as commonly used in civil rights law, means any act which denies, prevents, or limits any person from obtaining or maintaining employment, housing, or public accommodations based on race, age, gender, disability, nationality, or religion. Some states and localities have extended similar protections against discrimination based on factors such as marital or familial status, military status, sexual orientation, or political affiliation.

-- "**Equal protection**" refers to the clause in the Fourteenth Amendment to the United States Constitution which prohibits any state from adopting any law which denies the equal protection of the laws guaranteed to the citizens of the United States.

-- "**Political subdivision**" generally refers to a county, municipality, school district, local junior college district, special district, water conservation district, cooperative agency, regional commission, or an Indian tribe organized pursuant to the federal "Indian Reorganization Act of 1934," as amended.

-- "**Protected status**" means that a group has been identified for protection from actions which affect a protected or suspect class and which are limited or scrutinized as required by anti-discrimination statutes, ordinances, or common law.

-- "**Quota**" refers to a remedy which imposes numerical goals to correct past discriminatory employment practices.

-- "**Sexual orientation**" means the status of an individual as to his or her sexuality, for example, heterosexuality, homosexuality, lesbianism, or bisexuality.

Background

The proposed amendment arises in the context of three decades of increased governmental activity in the areas of civil rights. The concepts of the federal Civil Rights Act of 1964 have been extended by Congress, the states, and local governments which have enacted new laws and strengthened existing laws to prohibit discrimination in employment, housing, access to public accommodations, and other areas involving civil rights. Courts at all levels are involved in interpreting and applying these laws, and administrative agencies have been created to enforce some of them. The proposed amendment identifies one area -- discrimination based on homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships -- in which civil rights laws and policies could **not** be enacted or enforced by the state government or by local governments in Colorado.

Evidence of discrimination. There is disagreement concerning the extent of discrimination against homosexuals, lesbians, and bisexual persons. Discussions with public agencies which maintain records on such discrimination complaints reveal that these individuals have been found to experience discrimination in access to employment, housing, military service, commercial space, public

accommodations, health care, and educational facilities on college campuses. For example, of the 50 complaints reported to the Denver Agency for Human Rights and Community Relations in 1991, twenty-three were incidents of discrimination based on sexual orientation. Approximately 61 percent of these reports dealt with employment discrimination. Since 1988, the Boulder Office of Human Rights has investigated ten incidents of discrimination based on sexual orientation. Four of the complaints lacked sufficient evidence to be considered discrimination based on sexual orientation. It is generally recognized that discrimination complaints often go unreported because individuals fear the repercussions and further victimization associated with disclosure of their sexual orientation.

Current Laws and Policies

Presently, a patchwork of federal, state, and local laws, regulations, and policies are in effect which monitor, offer limited protection against, or prohibit discrimination based on sexual orientation.

Local ordinances. Three home rule cities -- Aspen, Boulder, and Denver -- have ordinances protecting individuals from job, housing, and public accommodations discrimination when that discrimination is based solely on sexual orientation. None of the ordinances requires quotas, affirmative action, minority status or requires that employers or landlords seek out homosexual, lesbian, or bisexual employees or tenants. These cities have determined that discrimination based on sexual orientation was a sufficient problem to warrant protections against discrimination in the areas of employment, housing, and public accommodations.

Aspen's ordinance prohibits discrimination in the areas of employment, housing, and public accommodations because of race, creed, color, religion, ancestry, national origin, sex, age, marital or familial status, physical handicap, sexual orientation, or political

affiliation. The Aspen ordinance does not exempt religious institutions. In Boulder, religious institutions cannot refuse to hire an individual or restrict access to public accommodations or housing because of that person's race, creed, color, gender, sexual orientation, marital or familial status, pregnancy, national origin, ancestry, age, or mental or physical disability. The Denver ordinance entirely exempts religious institutions, thus allowing them to refuse to hire persons or restrict access to public accommodations or housing based on a person's sexual orientation.

In Boulder, the owner of an owner-occupied, one-family dwelling or duplex is not permitted to deny housing to an individual based on his or her sexual orientation. However, the ordinance does allow owners to limit renters or lessees to persons of the same sex. In Denver, owners with rental spaces in their homes or duplexes (in which they reside) are exempted from the ordinance.

The anti-discrimination laws in these three cities do not classify homosexual, lesbian, or bisexual persons as ethnic minorities, but instead outlaw discrimination based on sexual orientation. These laws banning discrimination based on sexual orientation also prohibit discrimination against heterosexual individuals as well as against homosexual, lesbian, and bisexual persons. Attempts to pass similar anti-discrimination ordinances based on sexual orientation were defeated in Colorado Springs and Fort Collins. In addition, Denver Public Schools has adopted a nondiscrimination policy prohibiting discrimination based on sexual orientation.

State laws and policies. In 1990, the Governor issued an executive order prohibiting discrimination based on sexual orientation in the hiring, promotion, and firing of classified and exempt state employees. The order applies to executive departments and to state institutions of higher education. Metropolitan State College of Denver has a policy prohibiting college sponsored social clubs from discriminating in membership on the basis of sexual orientation. Colorado State University has a general nondiscrimination policy

prohibiting discrimination based on sexual orientation. Conversely, the University of Colorado board of Regents defeated a resolution prohibiting discriminatory practices based upon sexual orientation. The only Colorado statute offering protection based on sexual orientation prohibits health insurance companies from determining insurability based on an individual's sexual orientation. Legislation was defeated in 1991 which would have expanded Colorado's ethnic intimidation law to include the right of every person, regardless of age, handicapping condition or disability, or sexual orientation, to be protected from harassment. Recently, the Colorado Civil Rights Commission voted to recommend that the state's civil rights law be amended to prohibit discrimination based on sexual orientation.

Federal laws. There are no federal civil rights laws that protect persons from discrimination based on sexual orientation in the areas of housing, employment, or public accommodations. However, the federal Hate Crime Statistics Act of 1990 requires the United States Attorney General to monitor, in addition to other crimes, those crimes that manifest evidence of prejudice based on sexual orientation.

Laws and policies in other states, municipalities, and higher education institutions. Anti-discrimination laws and policies based on sexual orientation are not unique to Colorado. Six states (Connecticut, Hawaii, Massachusetts, New Jersey, Vermont, Wisconsin) and the District of Columbia, and approximately 110 cities and counties in 25 states have passed legislation protecting homosexual, lesbian, and bisexual persons from discrimination based on sexual orientation in employment, housing, and public accommodations. In contrast, the voters in Oregon will be considering an initiated measure, which among other provisions, would outlaw legislation aimed at protecting homosexual, lesbian, and bisexual persons from discrimination based on sexual orientation. In 1988, the voters in Oregon overturned an executive order that would have protected homosexual individuals from discrimination in state government.

Governors of eight states besides Colorado (California, Minnesota, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, and Washington) have issued executive orders prohibiting discrimination in state employment based on sexual orientation. Nationally, around 65 college and university systems have issued non-discrimination statements protecting heterosexual, homosexual, lesbian, and bisexual persons.

Impact of the Proposal

Passage of the amendment would make unenforceable and unconstitutional those ordinances which prohibit discrimination based on sexual orientation with regard to homosexual, lesbian, and bisexual persons. Therefore, the portion of those ordinances prohibiting discrimination based on sexual orientation adopted by the city council or approved by the voters in the cities of Aspen, Boulder, and Denver would be rendered invalid. In addition, the amendment would nullify existing anti-discrimination policies based on sexual orientation which have been adopted by any state branch of government, department, agency, or school district in Colorado and would prevent adoption of any state statute, local ordinance, or policy for public entities which prohibits discrimination based on sexual orientation. The amendment would not affect the anti-discrimination policies based on sexual orientation that have been adopted by numerous private employers. However, the amendment does not address the rights of heterosexual individuals to bring claims of discrimination under existing or future ordinances, therefore the impact of the amendment on the rights of heterosexuals is not known.

Arguments For

1) There is no evidence that homosexual, lesbian, and bisexual individuals are sufficiently disadvantaged to warrant designation as a protected class. Protected class status is not a basic

right guaranteed to all citizens by the United States Constitution. In general, protected class status has been afforded to groups which have historically been subjected to purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process, or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. Some groups which have been given protection are those identified because of national origin, culture, age, disability, gender, religion, and marital or familial status. Similarly, there are no organized, state-sanctioned legal barriers which deny their ability to participate in the political process as has been the situation faced by racial minorities, in particular. For these reasons, it appears that this amendment may pass constitutional muster.

2) Homosexual, lesbian, and bisexual persons do not require protected status because they are entitled to recourse under the tort laws for libelous or slanderous abuse, wrongful discharge, emotional distress, or similar theories. Since homosexual, lesbian, and bisexual persons cross all cultural lines they may already receive protections with regard to race, gender, age, ethnicity, disability, religion, or marital or familial status. Insufficient evidence exists for creating a legal cause of action by homosexual, lesbian, and bisexual individuals in employment, housing, and public accommodations to warrant adding sexual orientation as a protected class.

3) Granting protected status to homosexual, lesbian, and bisexual persons may compel some individuals to violate their private consciences or to face legal sanctions for failure to comply. For some individuals, homosexuality, or bisexuality conflicts with their religious values and teachings or their private moral values. If a landlord is required to rent an apartment, for example, to homosexual, lesbian, or bisexual persons, he or she may be asked to either condone a lifestyle of which they do not approve or to be in violation of a local ordinance. People and institutions should have the

right to express and act upon their moral convictions without being accused of discrimination.

4) The amendment does not have a negative impact on home rule autonomy of Colorado cities nor does it intrude into traditional powers of local government. The Colorado Constitution guarantees local municipalities the ability to function legislatively only in municipal affairs. Civil rights issues are not normally considered by local governments. Because of the importance of these issues, a wider spectrum of individuals than just municipalities should consider these matters. Consideration of individual and group civil rights on the municipal level sets an improper precedent and only serves to dilute the original purpose of legislation enacting civil rights protections.

5) A proliferation of local ordinances or the possibility of a state statute that would provide protected status for homosexual, lesbian, and bisexual persons may divert resources for current enforcement activities. Additional discrimination cases may produce a demand for more staff and other state and local resources to investigate complaints, resolve disputes, or litigate cases.

Arguments Against

1) All individuals should be accorded the same basic dignity, right to privacy, privileges, and protections guaranteed to every citizen. Discrimination against any class of individuals is wrong and, if tolerated, can easily spread to any and all groups in our society. In a pluralistic society, a threat to the rights of any one group should be viewed as a threat to the rights of all citizens. The amendment deprives homosexual, lesbian, and bisexual persons of legal protection against discrimination based on sexual orientation by isolating them as a class which could not be protected by such civil rights laws. Civil rights laws are constantly evolving to meet the demands of society, and no group of people should be precluded from seeking

civil rights protection or protection from discrimination. Civil rights laws prohibiting discrimination against homosexual, lesbian, and bisexual persons do not condone or encourage homosexuality or bisexuality; rather, they only condemn discrimination of any nature and ensure equal opportunity for every citizen. By eliminating legal protections, the amendment sanctions prejudicial acts against homosexual, lesbian, and bisexual persons.

2) Because homosexual, lesbian, and bisexual persons face discrimination in employment, housing, and public accommodations and are victims of hate crimes, civil rights laws are needed that prohibit discrimination based on sexual orientation. Without the ordinances, existing laws inadequately protect these individuals and fail to address discrimination in employment, housing, and public accommodations. Homosexual, lesbian, and bisexual individuals belong to all economic classes and are members of all racial, ethnic, disability, age, and religious communities. Because the kind of discrimination that these individuals experience is solely connected to a person's sexual orientation, the added protection in the ordinances gives homosexual, lesbian, and bisexual individuals legal recourse should they be discriminated against on the basis of their sexual orientation.

3) The amendment attacks home rule autonomy and intrudes into the traditional powers of local governments and political subdivisions with respect to civil rights. Two-thirds of all Coloradans live in home rule cities. Under the Colorado Constitution home rule cities are empowered to address the needs of their residents as they see fit. This amendment also undermines county powers and the ability of the executive branch of government, school districts, and political subdivisions to enact their own anti-discrimination policies on this issue. The amendment implies that governmental entities, including the state, counties, cities, school districts, and other political subdivisions, should not be trusted to decide whether or not to protect persons from discrimination based on sexual orientation.

4) Ensuring the civil rights of any person, whether for age, gender, race, disability, religion, sexual orientation, marital or familial status, does no more than protect persons from discrimination and guarantee their basic human rights. The amendment is misleading and prejudicial by implying that homosexual, lesbian, and bisexual persons are seeking "minority status" or "quota preferences." Instead, the current local ordinances protect the right to get a job, buy a house, or have the same access to public accommodations as every other citizen. Each of these local ordinances also bans discrimination on the basis of age, gender, disability, religion, and marital or familial status, which are factors that are unrelated to whether a person is a member of a racial or ethnic group.

5) By singling out homosexual, lesbian, and bisexual persons in the state constitution and effectively denying them potential remedies for discrimination, the amendment denies them the same equal protections under the United States Constitution as other citizens. The proposed amendment may violate the equal protection clause of the United States Constitution, which prohibits any state from adopting a law which singles out a group for unfavorable or discriminatory treatment without a sufficient basis, or due to prejudice or irrational fears. For example, those city ordinances barring discrimination on the basis of sexual orientation could still be applicable to heterosexual individuals bringing claims of discrimination based on sexual orientation in housing, employment, and public accommodations, but not to homosexual, lesbian, and bisexual persons. Arbitrarily discriminating against any class of individuals in employment decisions based on sexual orientation is a violation of equal protection laws. Further, it is also a violation for a state to adopt a constitutional amendment which arbitrarily discriminates against homosexuals.

Supreme Court, U.S.
FILED
OCT 12 1993
OFFICE OF THE CLERK

No. 93-453

In The

Supreme Court of the United States

October Term, 1993

ROY ROMER, as Governor of the State of Colorado, GALE NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

vs.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado

BRIEF IN OPPOSITION

EDWARD M. CASWALL*
City Attorney

JOHN P. WORCESTER
Assistant City Attorney

City of Aspen
130 South Galena Street
Aspen, Colorado 81611
Telephone (303) 920-5055

Attorneys for Respondents City of Aspen and City Council of Aspen

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Did the Colorado Supreme Court err in affirming the entry of a preliminary injunction enjoining the operation and effectiveness of a citizen-initiated state constitutional amendment upon a finding that the amendment, to a reasonable probability, infringes on a fundamental right protected by the Equal Protection Clause of the United States Constitution and has not been shown at the current stage of the proceedings to be supported by a compelling state interest.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

Cases iii

Constitutional Provisions iii

Statutes/Ordinances iii

CONSTITUTIONAL AND ORDINANCE PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE PETITION 6

THE DECISION CHALLENGED BY PETITIONERS DOES NOT CONSTITUTE A FINAL DECISION SUBJECT TO REVIEW UNDER SECTION 1257 OF TITLE 28 OF THE UNITED STATES CODE 6

CONCLUSION 8

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

ASARCO, Inc. v. Kadish, 490 U.S. 605, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989) 6

Cox Broadcasting Corporation v. Cohn, 420 U.S. 478, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) 6, 7

Flynt v. Ohio, 451 U.S. 619, 101 S.Ct. 1958, 68 L.Ed.2d 489 (1981) 6, 7

Local No. 438 v. Curry, 371 U.S. 542, 83 S.Ct. 531, 9 L.Ed.2d 514 (1963) 7

Minnick v. California Department of Corrections, 452 U.S. 105, 101 S.Ct. 2211, 68 L.Ed.2d 706 (1981) 7

Organization For A Better Austin v. Keefe, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971) 7

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092 (1945) 6

CONSTITUTIONAL PROVISIONS

Colorado Constitution, Article II, §30b 1, 3

United States Constitution, Amendment XIV, §1 ... 1, 4

STATUTES/ORDINANCES

Municipal Code of the City of Aspen, §13-98 1, 3, 4

United States Code, Title 28, §1257 ..... 6, 7

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article II, §30b of the Colorado Constitution provides:

> NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN, OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have any claim of minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

ORDINANCE PROVISIONS INVOLVED

Section 13-98 of the Municipal Code of the City of Aspen (1977) provides in pertinent part:

> Sec. 13-98. Discriminatory practices prohibited.
>
> (a) Definitions.
>
> (1) *Discrimination*: "Discrimination" or "to discriminate" means, without limitation, any

act which because of race, color, creed, religion, ancestry, national origin, sex, age, marital status, physical handicaps, affectional or sexual orientation, family responsibility, or political affiliation, results in the unequal treatment or separation of any person or denies, prevents, limits or otherwise adversely affects, the benefit or enjoyment of any person of employment, ownership or occupancy of real property or public services or accommodations. Such discrimination is unlawful and is a violation of this section, provided, however, that the physical condition of an existing building or structure shall not, of itself, constitute discrimination.

* * *

(b) *Discriminatory employment practices prohibited.* It shall be unlawful for any person who is an employer or employment agency, directly or indirectly, to discriminate against any employee with regard to application for employment, hiring, occupational training, tenure, promotion, compensation, layoff, discharge, or any other term or condition of employment except when based upon a bona fide occupational qualification.

(c) *Discriminatory housing practices prohibited.* It shall be unlawful for any person, directly or indirectly, to discriminate against or to accord adverse, unlawful or unequal treatment to any other person with respect to the acquisition, occupancy, use and enjoyment of any housing, including the sale, transfer, rental or lease thereof.

(d) *Discriminatory public services and accommodation practices prohibited.* It shall be unlawful for a person engaged in providing services or accommodations to the public to, directly or indirectly, discriminate against any other person by refusing to allow the full and equal use and enjoyment of the goods, services, facilities, privileges, advantages, including accommodations, and the terms and conditions under which the same are made available, or to provide adverse, unlawful, or unequal treatment to any person in connection therewith.

* * *

STATEMENT OF THE CASE

On November 17, 1977, the City of Aspen adopted a comprehensive anti-discrimination ordinance prohibiting invidious discrimination in employment, housing and public accommodations within the city, including discrimination based upon affectional or sexual orientation. Municipal Code of the City of Aspen §13-98 (1977). The ordinance does not identify or classify homosexual, lesbian, or bisexual persons as a "suspect class" and equally prohibits discrimination against heterosexual individuals. Res. App. at A-1; see also, Pet. App. at C-4.

On November 3, 1992, a majority of the Colorado electorate passed a statewide ballot proposal commonly known as "Amendment 2"[1] which was intended to

[1] Article II, §30b, Colorado Constitution.

amend the Colorado Constitution so as to effect an immediate repeal of all state and local legislative, regulatory and administrative anti-discrimination measures protecting homosexual, lesbian and bisexual citizens from invidious discriminatory acts, including §13-98 of the Aspen Municipal Code. In addition to nullifying existing anti-discrimination protections, Amendment 2 also has the objective of stripping all elected officials and levels of government of their discretion and authority to adopt or enforce future legislation or regulations prohibiting discrimination against homosexuals, lesbians and bisexual individuals. In furtherance of that objective, Amendment 2 mandates a fundamental change in the traditional political processes historically utilized by citizens to initiate legislative measures in their interest so as to foreclose the local or statewide adoption of legislation protecting homosexual, lesbian and bisexual individuals from discrimination in employment, housing and public accommodations absent the consent of a majority of the Colorado electorate by way of the passage of a subsequent amendment to the Colorado Constitution.

On November 12, 1993, Aspen joined with several other parties in initiating litigation in state court challenging the constitutional validity of Amendment 2 and seeking to enjoin its implementation. Claiming that Amendment 2 violated guarantees to the equal protection of the law as provided under the Fourteenth Amendment to the Constitution of the United States, Aspen moved for preliminary injunctive relief on December 28, 1992. After a four-day hearing, the trial court entered an order on January 15, 1993, preliminarily enjoining the enforcement of Amendment 2, concluding that the measure infringed

upon a fundamental constitutional right and was likely unconstitutional. A trial on the merits was set for October 12, 1993.

On January 19, 1993, the petitioners herein appealed the trial court's order to the Colorado Supreme Court, which affirmed on July 19, 1993. In upholding the injunction, the court found that the right of citizens to participate in the process of government is a core democratic value and that the opportunity to participate on an equal basis in such process constituted a fundamental constitutional right guaranteed by the Equal Protection Clause. Pet. App. at A-10 and A-11. The court further held that inasmuch as Amendment 2 mandated a restructuring of the political and governmental processes for the purpose of imposing singular disadvantages and burdens upon homosexuals, lesbians and bisexuals, the amendment, to a reasonable probability, infringed upon the fundamental right of citizens to participate equally in the political process and must, therefore, be subject to strict judicial scrutiny. Pet. App. at A-29 to A-31.

Since the entry of the decision affirming the issuance of the preliminary injunction, petitioners have twice moved and failed to obtain a continuance from the trial court of the trial date[2] and, likewise, have failed in obtaining relief by way of mandamus and/or prohibition regarding the trial date from the Colorado Supreme Court.[3] The trial on the merits of the respondents' claims remains scheduled to commence on October 12, 1993.

---

[2] August 6, 1993 and September 28, 1993.

[3] August 11, 1993.

REASONS FOR DENYING THE PETITION

THE DECISION CHALLENGED BY PETITIONERS DOES NOT CONSTITUTE A FINAL DECISION SUBJECT TO REVIEW UNDER SECTION 1257 OF TITLE 28 OF THE UNITED STATES CODE.

Section 1257 of Title 28 of the United States Code grants jurisdiction to the Supreme Court to review by way of writ of certiorari only "final judgments or decrees" rendered by the highest court of a State in which a decision could be had. The final judgment requirement generally precludes review of a state court decision where anything further remains to be determined by the state court. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124, 65 S.Ct. 1475, 89 L.Ed. 2092 (1945). While there are exceptions to the final judgment rule, *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 478, 479-484, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), such exceptions must not only involve a final state court judgment on the federal issue subject to review, but must be free of other federal issues needing resolution, thus, foreclosing the probability of piecemeal review with respect to the federal issues. *Flynt v. Ohio*, 451 U.S. 619, 622, 101 S.Ct. 1958, 68 L.Ed.2d 489 (1981); *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 612, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989).

The Colorado Supreme Court expressly noted in its ruling below that several federal claims and issues in addition to the equal protection claim that was the focus of the preliminary injunction proceedings remain to be heard and resolved in the trial court. See, Pet. App. at A-3 n.2. Similarly, neither the trial court nor the Colorado Supreme Court entered or intended to enter a final determination on the constitutional validity of Amendment 2

by their rulings. See, Pet. App. at A-31 and B-5. Contrary to the argument as put forth by the petitioners, the decision of the Colorado courts in issuing and affirming the preliminary injunction did not conclude the federal claims and disputes between the parties or preordain any given result in respect to their resolution. See, *Cox Broadcasting Corporation v. Cohn, supra,* 420 U.S. at 479. Granting the petition for certiorari at this stage of the proceedings between the parties would result in the kind of piecemeal appellate review proscribed by 28 U.S.C. §1257 and disfavored by the Supreme Court. *Compare, Flynt v. Ohio, supra,* and *Minnick v. California Department of Corrections,* 452 U.S. 105, 120-123, 101 S.Ct. 2211, 68 L.Ed.2d 706 (1981) with *Organization For A Better Austin v. Keefe,* 402 U.S. 415, 418 n.1, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971) and *Local No. 438 v. Curry,* 371 U.S. 542, 548, 83 S.Ct. 531, 9 L.Ed.2d 514 (1963).

CONCLUSION

The ruling of the Colorado Supreme Court not being a final decision coming within the parameters of Section 1257 of Title 28 of the United States Code, the Supreme Court should deny the Petition For Writ Of Certiorari.

Respectfully submitted,

EDWARD M. CASWALL*
City Attorney

JOHN P. WORCESTER
Assistant City Attorney

City of Aspen
130 South Galena Street
Aspen, Colorado 81611
Telephone (303) 920-5055

Attorneys for Respondents
City of Aspen and
City Council of Aspen

*Counsel of Record

APPENDIX

Sec. 13-98. Discriminatory practices prohibited.

(a) Definitions.

(1) *Discrimination*: "Discrimination" or "to discriminate" means, without limitation, any act which because of race, color, creed, religion, ancestry, national origin, sex, age, marital status, physical handicaps, affectional or sexual orientation, family responsibility, or political affiliation, results in the unequal treatment or separation of any person or denies, prevents, limits or otherwise adversely affects, the benefit or enjoyment of any person of employment, ownership or occupancy of real property or public services or accommodations. Such discrimination is unlawful and is a violation of this section, provided, however, that the physical condition of an existing building or structure shall not, of itself, constitute discrimination.

(2) *Housing*: "Housing" means any building, structure, vacant land or part thereof during the period it is advertised, listed or offered for sale, lease, rent or transfer of ownership, and during the period while it is being sold, leased or rented.

(3) *Public services or accommodations*: "Public services or accommodations" means any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages or accommodations to the public.

(4) *Person*: "Person" means any individual, firm, partnership, corporation, association, organization, unincorporated organization, labor union, government agency, incorporated society, statutory or common law trust, estate, executor,

administrator, receiver, trustee, conservator, liquidator, trustee in bankruptcy, committee, assignee, officer, employee, principal or agent, legal or personal representative, real estate broker or salesman or any agent or representative of any of the aforegoing.

(b) *Discriminatory employment practices prohibited.* It shall be unlawful for any person who is an employer or employment agency, directly or indirectly, to discriminate against any employee with regard to application for employment, hiring, occupational training, tenure, promotion, compensation, layoff, discharge, or any other term or condition of employment except when based upon a bona fide occupational qualification.

(c) *Discriminatory housing practices prohibited.* It shall be unlawful for any person, directly or indirectly, to discriminate against or to accord adverse, unlawful or unequal treatment to any other person with respect to the acquisition, occupancy, use and enjoyment of any housing, including the sale, transfer, rental or lease thereof.

(d) *Discriminatory public services and accommodation practices prohibited.* It shall be unlawful for a person engaged in providing services or accommodations to the public to, directly or indirectly, discriminate against any other person by refusing to allow the full and equal use and enjoyment of the goods, services, facilities, privileges, advantages, including accommodations, and the terms and conditions under which the same are made available, or to provide adverse, unlawful, or unequal treatment to any person in connection therewith.

(e) *Penalties and civil liability.* Any person who violates the provisions of subsections (b) through (d) hereof

shall be deemed guilty of an offense and upon conviction thereof shall be punished by a fine not exceeding three hundred dollars ($300.00) or imprisonment of not more than ninety (90) days or both such fine and imprisonment, at the discretion of the court. In addition, any person claiming to be aggrieved by an unlawful discriminatory act shall have a cause of action in any court of competent jurisdiction for compensatory damages and such other remedies as may be appropriate, including specifically the issuing of restraining orders and such temporary or permanent injunctions as are necessary to obtain complete compliance with this section. In addition, the prevailing party shall be entitled to reasonable attorney fees and costs.

(f) Whenever it appears that the holder of a permit, license, franchise, benefit, or advantage, issued by the City of Aspen is in violation of this section, notwithstanding any other action it may take or may have taken under the authority of the provisions of this section, the City of Aspen may take such action regarding the temporary or permanent suspension of the violator's City of Aspen business license, permit, franchise, benefit or advantage as it considers appropriate based on the facts disclosed to it.

Supreme Court, U.S.
FILED
OCT 18 1993
OFFICE OF THE CLERK

No. 93-453

In The

Supreme Court of the United States

October Term, 1993

ROY ROMER, as Governor of the State of Colorado, GALE NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

vs.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado Case No. 93SA017

BRIEF IN OPPOSITION

JEAN E. DUBOFSKY, P.C.
JEAN E. DUBOFSKY*
1881 Ninth Street, Suite 210
Boulder, CO 80302
(303) 447-3510

Attorneys for Respondents

*Counsel of Record

[Additional counsel for Respondents listed on inside front cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

Additional Counsel for Respondents:

JEANNE WINER
Attorney at Law
1942 Broadway,
Suite 404
Boulder, CO 80302
(303) 938-6836

GREGORY A. EURICH
HOLLAND & HART
555 17th Street,
Suite 2900
P.O. Box 8479
Denver, CO 80201
(303) 295-8166

DAVID H. MILLER
American Civil Liberties
Union of Colorado
400 Corona Street
Denver, CO 80218
(303) 777-5482

MATTHEW A. COLES
WILLIAM B. RUBENSTEIN
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800, Ext. 545

CLYDE J. WADSWORTH
WILSON, SONSINI, GOODRICH
& ROSATI
2 Palo Alto Square
Palo Alto, CA 94306
(415) 493-9300

SUZANNE B. GOLDBERG
Lambda Legal Defense and
Education Fund, Inc.
666 Broadway
New York, NY 10012
(212) 995-8585

CITY AND COUNTY OF DENVER
CITY ATTORNEY
DARLENE M. EBERT
Assistant City Attorney
1445 Cleveland Pl.,
Room 303
Denver, CO 80202-5375
(303) 640-2931

BOULDER CITY ATTORNEY
JOSEPH N. DE RAISMES, III
JANE W. GREENFIELD
P.O. Box 791
Boulder, CO 80306
(303) 441-3020

QUESTION PRESENTED FOR REVIEW

Whether this Court should review, during the course of on-going state court proceedings, an interim ruling of the Colorado Supreme Court that affirms the issuance of a preliminary injunction, where the basis for the injunction of a state constitutional amendment that would exclude from the political process gay men, lesbians and bisexuals as an identifiable group preserves the status quo pending resolution of the underlying lawsuit and is consistent with this Court's precedents.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 5

I. THIS COURT LACKS JURISDICTION BECAUSE THE COLORADO SUPREME COURT'S INTERIM RULING UPHOLDING THE DISTRICT COURT'S ENTRY OF A PRELIMINARY INJUNCTION IS NOT A FINAL JUDGMENT OR DECREE WITHIN THE MEANING OF 28 U.S.C. § 1257(a) 5

A. The interim ruling does not preordain the outcome of this case or conclude it for all practical purposes 7

B. The remaining proceedings in state court will give rise to additional federal questions not yet addressed by the Colorado Supreme Court 10

C. Later review of this case can be had after a final judgment on the merits 11

TABLE OF CONTENTS – Continued

Page

D. The Colorado Supreme Court's interim ruling enjoining a state law to protect asserted federal rights does not threaten any federal policy with erosion..... 12

II. THE COLORADO SUPREME COURT'S INTERIM RULING IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND DOES NOT PRESENT AN ISSUE OF SUCH IMPORTANCE THAT IT REQUIRES THIS COURT'S UNPRECEDENTED INTERFERENCE WITH THE ONGOING STATE COURT PROCEEDINGS..... 17

A. The Colorado Supreme Court's interim ruling is consistent with this Court's precedents..... 17

B. The Colorado Supreme Court did not rule that classifications based on sexual orientation are suspect and thus did not contradict any federal circuit court rulings..... 23

C. The decision below does not interfere with the interest of the state in enacting appropriate legislation..... 24

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

ASARCO, Inc. v. Kadish, 490 U.S. 605 (1989) 10

Avery v. Midland County, 390 U.S. 474 (1968) 20

Burson v. Freeman, ___ U.S. ___, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992) 9

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) ..*passim*

Dunn v. Blumstein, 405 U.S. 330 (1972) 18

Evans v. Romer, 854 P.2d 1270 (Colo. 1993).. 1, 3, 4, 17, 24

Gordon v. Lance, 403 U.S. 1 (1973) 21, 22

Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) 18

Hunter v. Erickson, 393 U.S. 385 (1969) ..... *passim*

James v. Valtierra, 402 U.S. 137 (1971)..... 21

Kramer v. Union Free School District, 395 U.S. 621 (1969) 18, 19

Local No. 438 Construction & General Laborers' Union v. Curry, 371 U.S. 542 (1963) 11, 12

Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713 (1964) 18

Minnick v. California Dep't of Corrections, 452 U.S. 105 (1981) 6, 7

Montgomery Bldg & Construction Trades Council v. Ledbetter Erection Co., 344 U.S. 178 (1952) 6

Murdock v. Memphis, 20 Wall. 590 (1875)..... 13

TABLE OF AUTHORITIES – Continued

Page

National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977) 12

North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156 (1973) 11

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) 12, 13, 14

Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 7

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 14

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 11, 14

Reynolds v. Sims, 377 U.S. 533 (1964) 18, 19, 20

Southland Corp. v. Keating, 465 U.S. 1 (1984) 12

Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305 (1985) 14, 15, 16

Wesberry v. Sanders, 376 U.S. 1 (1964) 18

Williams v. Rhodes, 393 U.S. 23 (1968) 18

STATUTES

28 U.S.C. § 1252 16

28 U.S.C. § 1254 ..... 15, 16

28 U.S.C. § 1257 ..... 1, 5, 6, 14, 15, 16

28 U.S.C. § 1292 15

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 2, 13

U.S. Const. amend. XIV 2, 3, 18

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITY

Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 Harv. L. Rev. 1905 (1993) 20, 22

Note, *The Finality Rule for Supreme Court Review of State Court Orders*, 91 Harv. L Rev. 1004 (1978) 14

OPINIONS BELOW

The opinion of the district court (pet. app. B) granting the preliminary injunction is not reported. The opinion of the Colorado Supreme Court (pet. app. A) affirming the district court's preliminary injunction is reported at 854 P.2d 1270 (Colo. 1993).

JURISDICTION

As discussed *infra* at 5, respondents contend that this Court lacks jurisdiction to review the decision of the Colorado Supreme Court because that decision is not a final judgment as required by 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

On November 3, 1992, a majority of Colorado voters approved a voter-initiated ballot measure to amend the Colorado Constitution. The amendment, known popularly as Amendment 2, provides that:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This

Section of the Constitution shall be self-executing.

The amendment deprives all branches of state government (the legislative, executive, and judicial), state agencies (including state universities and colleges), political subdivisions (including counties), municipalities and school districts of the power to remedy "any claim of discrimination" based on "homosexual, lesbian or bisexual orientation." Amendment 2 also repeals various statutes, policies, and local ordinances that prohibit discrimination on the basis of sexual orientation.

On November 12, 1992, the respondents (hereinafter "the plaintiffs") filed suit in Denver District Court. The plaintiffs sought a declaration that Amendment 2 was unconstitutional under the United States Constitution and an injunction to prevent the petitioners (hereinafter "the state") from enforcing the amendment. The individual plaintiffs alleged that Amendment 2 violated several provisions of the U.S. Constitution, including the equal protection clause of the Fourteenth Amendment, the free speech and petition clauses of the First Amendment, the supremacy clause, and the right to due process protected by the Fourteenth Amendment. The plaintiff cities sought a declaratory judgment about the effect of Amendment 2 on their home rule powers. The plaintiff school district sought a declaratory judgment about the effect of Amendment 2 on its policies to protect gay and lesbian students from discrimination.

Under Colorado law, Amendment 2 was to become effective January 14, 1993. To prevent Amendment 2 from becoming effective, the plaintiffs advanced three of their

numerous legal theories in a motion for preliminary injunction. First, they argued that Amendment 2 should be subjected to strict scrutiny under the equal protection clause because Amendment 2 burdens a fundamental right to participate in the political process. Second, the plaintiffs contended that Amendment 2 violates the equal protection clause even without strict scrutiny because it bears no reasonable relation to any legitimate governmental purpose. Finally, the plaintiffs contended that Amendment 2 violates the free speech clause of the First Amendment.

On January 15, 1993, after a four-day hearing, the district court granted the plaintiffs' motion for a preliminary injunction. The district court determined that Amendment 2 burdened "the right not to have the State endorse and give effect to private biases." B-20. The district court temporarily enjoined the state from enforcing Amendment 2 until resolution of the plaintiffs' claims on the merits.

The state sought interlocutory review of the preliminary injunction before the Colorado Supreme Court. On July 19, 1993, the Colorado Supreme Court upheld the trial court's grant of preliminary injunctive relief. *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993).

The Colorado Supreme Court ruled that the plaintiffs had a reasonable likelihood of prevailing on the merits of their claim that Amendment 2 violated the Fourteenth Amendment's equal protection clause because Amendment 2 burdened a fundamental right to participate in the political process. *Evans*, 854 P.2d at 1286. Because Amendment 2 burdened a fundamental right, the court held that

"Amendment 2 must be subject to strict judicial scrutiny in order to determine whether it is constitutionally valid under the Equal Protection Clause." *Id.* Noting that "the defendants and their amici have not proffered any compelling state interest to justify the enactment of Amendment 2 at this stage of the proceedings," the Colorado Supreme Court upheld the trial court's preliminary injunction and remanded the case to the trial court for a determination on the merits of all of the plaintiffs' claims and the state's affirmative defenses. *Id.*

On August 16, 1993, both parties indicated in disclosure certificates that they planned to assert at trial federal claims or affirmative defenses not yet addressed by either the trial court or the Colorado Supreme Court. The plaintiffs contended in their disclosure certificate that Amendment 2 discriminated against a suspect or quasi-suspect class and, therefore, was subject to some sort of heightened scrutiny. The plaintiffs also contended that Amendment 2 is not rationally related to a legitimate purpose and violates the free speech and petition clauses of the First Amendment. The state contended that Amendment 2 was narrowly tailored to serve compelling government interests and, therefore, would survive the strict judicial scrutiny required by the Colorado Supreme Court. The state's disclosure certificate listed six interests that allegedly were compelling and disclosed numerous expert and lay witnesses who would testify about the compelling weight of these interests.

Trial on the merits of the plaintiffs' claims began on October 12, 1993 and will end on October 22. Both sides are calling numerous fact and expert witnesses to establish the record on which the plaintiffs' legal claims will be

determined. The trial court has not yet issued any findings of fact or conclusions of law on the merits of any of the plaintiffs' federal claims or the state's affirmative defense that Amendment 2 is narrowly tailored to serve a compelling interest. Only the propriety of a preliminary injunction has been decided by the Colorado Supreme Court.

REASONS FOR DENYING THE PETITION

I. THIS COURT LACKS JURISDICTION BECAUSE THE COLORADO SUPREME COURT'S INTERIM RULING UPHOLDING THE DISTRICT COURT'S ENTRY OF A PRELIMINARY INJUNCTION IS NOT A FINAL JUDGMENT OR DECREE WITHIN THE MEANING OF 28 U.S.C. § 1257(a).

The state seeks review by this Court of an interim ruling by the Colorado Supreme Court that upholds a preliminary injunction granted by a state trial court pending the outcome of a trial that is currently under way. Review of such a non-final order is beyond the scope of this Court's jurisdiction, would be wasteful of judicial resources, and would undermine principles of federalism.

28 U.S.C. § 1257(a) provides the statutory basis for this Court's jurisdiction to review decisions of state courts by writ of certiorari:

> "*Final* judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States."

(emphasis added). Thus, this Court may review only "final judgments or decrees" of a state court. As the Colorado Supreme Court's decision at issue is not a final judgment or decree under 28 U.S.C. § 1257(a), this Court lacks jurisdiction and the Petition for Writ of Certiorari should be denied.

The interim ruling below – which affirms the trial court's award of an injunction preliminarily enjoining the enforcement of state law – is not final "in the sense that no further proceedings can possibly take place in the state judicial system." *Minnick v. California Dep't of Corrections*, 452 U.S. 105, 120 (1981) (state court judgment not final for purposes of section 1257 where additional proceedings in state trial court could significantly affect outcome of federal issues presented in certiorari petition). On the contrary, the interim ruling simply affirmed an injunction that preserved the status quo pending a full trial on the merits of the plaintiffs' claims. That trial, which began on October 12, 1993, is on-going at the time of this filing. Under traditional principles of finality, such an affirmance of a preliminary injunction is not a final judgment: the preliminary injunction does not finally dispose of the case on the merits, and proceedings on the merits remain to be had in state court.[1]

---

[1] *See, e.g., Montgomery Bldg & Construction Trades Council v. Ledbetter Erection Co.*, 344 U.S. 178, 180-81 (1952) (holding that Alabama Supreme Court's decision upholding state trial court's preliminary injunction of labor organization's picketing activities is not final order and noting that "from the earliest days, this Court has refused to accept jurisdiction of interlocutory decrees [such as preliminary injunctions]").

Not surprisingly, the state has cited no case in which this Court has intervened in ongoing state proceedings to review a preliminary injunction affecting the operation of a state law in favor of asserted federal rights. "Normally the finality doctrine . . . is not satisfied if the state courts must conduct further substantive proceedings before the rights of the parties as to the federal issue are resolved." *Pennsylvania v. Ritchie*, 480 U.S. 39, 47 (1987); *see also Minnick*, 452 U.S. at 120.

The state is correct in noting that, under certain, limited circumstances, this Court may consider a state court decision to be final for purposes of section 1257 even though further proceedings are anticipated in the lower state courts. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court described four categories of cases in which immediate review may be appropriate. This case does not fall into any of those exceptions to the finality doctrine.

A. The interim ruling does not preordain the outcome of this case or conclude it for all practical purposes.

In the first *Cox Broadcasting* category are those cases in which "the federal issue is conclusive or the outcome of further proceedings preordained" so that "the case is for all practical purposes concluded." 420 U.S. at 479. The first *Cox* category is inapplicable to this case because the federal issue addressed by the Colorado Supreme Court in affirming the preliminary injunction is not conclusive of the merits, and the outcome of further proceedings in state court is not "preordained." *Id.* The interim ruling

below did not decide – and could not have decided – several federal questions that are currently being tried by the state court. Moreover, the interim ruling with respect to the single federal issue addressed did not conclusively resolve even that issue because the court did not apply the articulated legal standard to the facts in this case.

The interim ruling below did not address all of the plaintiffs' federal claims because the plaintiffs moved for preliminary relief only on some of them. The interim ruling addressed the theory that Amendment 2 unconstitutionally burdened a fundamental right to participate in the political process. The federal claims that are not addressed by the interim ruling – and remain pending in the district court – include claims that Amendment 2 (1) unconstitutionally discriminates against a suspect or quasi-suspect class of gay men, lesbians, and bisexuals in violation of the equal protection clause; (2) serves no legitimate purpose under *any* level of equal protection review; (3) unconstitutionally restricts speech under the First Amendment; and (4) unconstitutionally restricts the right to petition the government under the First Amendment. Therefore, it cannot be said that "because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is final." *Cox Broadcasting*, 420 U.S. at 479.

The first *Cox Broadcasting* category is also inapplicable because there has yet to be a determination by any state court as to application of the legal standard to the facts of the case – namely, whether Amendment 2 serves a compelling interest through the least restrictive means. Until the Colorado Supreme Court makes such a determination, there cannot be a final state court judgment

defining the rights of the parties even on the single legal theory addressed by that court.

The state suggests that, because the Colorado Supreme Court's decision places a heavy burden on the state, the case is for all practical purposes concluded within the meaning of the first *Cox Broadcasting* category. This suggestion is meritless. The burden of proving a compelling state interest is not so insurmountable that requiring such proof preordains the outcome of any case. Indeed, this Court repeatedly has upheld state laws on the ground that such laws served a compelling state interest, even when such laws burden a fundamental right. *See, e.g., Burson v. Freeman*, ___ U.S. ___, 112 S.Ct. 1846, 119 L.Ed.2d 5, 14-15 (1992), and cases cited therein.

The state's suggestion that the interim ruling preordains the outcome of the trial is also inconsistent with the state's declarations before the trial court. The state has contended in its disclosure certificate that Amendment 2 serves at least six compelling state interests and that the trial court may uphold Amendment 2 even under the strict judicial scrutiny required by the Colorado Supreme Court's ruling. Far from conceding that the outcome of further proceedings is "preordained" by the interim decision below, the state has provided summary statements and affidavits for over two dozen expert witnesses, ranging from psychiatrists to political scientists[2]. These witnesses began to testify in support of the state's proffered interests on October 15, before the date on which this

---

[2] The state moved for summary judgment, arguing that it was entitled to judgment on the merits of its affirmative defense that Amendment 2 serves a compelling governmental interest.

Opposition to the State's Petition for Certiorari Review has been filed.

Therefore, the state itself effectively concedes that the case is *not* "for all practical purposes concluded" by the Colorado Supreme Court's interim ruling. To the contrary, if the state succeeds in its stated intention of proving that Amendment 2 serves a compelling state interest by the least restrictive means, Amendment 2 will be upheld and this Court's determination of the issues raised in the Petition will be unnecessary.

B. The remaining proceedings in state court will give rise to additional federal questions not yet addressed by the Colorado Supreme Court.

This Court may find finality under the second *Cox Broadcasting* exception only if the "remaining issues [to be decided in further state court proceedings] will not give rise to *any* further federal questions." *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 612 (1989) (emphasis added). There are several federal claims that are pending, that have never been addressed by any state court, and that will be decided by the trial court after a hearing on the merits. Those include claims that Amendment 2 (1) discriminates against a suspect or quasi-suspect class in violation of the equal protection clause; (2) serves an illegitimate purpose of advancing private bias, in violation of any standard of equal protection review; (3) deprives the plaintiffs of their right to petition the government under the First Amendment; and (4) chills speech in violation of the First Amendment. Because the scheduled trial in this case will "require the decision of other federal questions that also

might require review by the Court at a later date," *Cox Broadcasting*, 420 U.S. at 478, the interim ruling is not a final disposition of all the federal questions in this case.

Indeed, to review only the question decided in the interim ruling would invite piecemeal review that the requirement of finality is intended to avoid. *See, e.g., North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156, 159 (1973). Assuming *arguendo* that this Court were to reverse the interim ruling below, the plaintiffs would still seek a determination from the trial court pursuant to this Court's holding *and* with respect to their other federal claims. This Court would then face another appeal in this case from the Colorado Supreme Court's disposition of those additional ~~federal~~ issues. Such piecemeal review of the federal claims in a single case wastes judicial resources. *See, e.g., Local No. 438 Construction & General Laborers' Union v. Curry*, 371 U.S. 542, 550 (1963). Moreover, interlocutory interference with state court proceedings is contrary to the policy of federalism that the doctrine of finality is intended to advance. *See, e.g., Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).

C. Later review of this case can be had after a final judgment on the merits.

This case also does not fall into the third *Cox Broadcasting* exception to the strict finality requirement. The state has not alleged that this is a case where "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." 420 U.S. at 480. This Court will be able to review all of the federal questions in this

case on a complete record after the trial court enters findings of fact and conclusions of law and those findings and conclusions are reviewed by the Colorado Supreme Court.

D. The Colorado Supreme Court's interim ruling enjoining a state law to protect asserted federal rights does not threaten any federal policy with erosion.

Finally, the *Cox Broadcasting* Court stated that "if refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." 420 U.S. at 483. The purpose of this category is to allow immediate review where some federal policy may be threatened by an interlocutory state court decision finding that federal law is inapplicable.[3]

This fourth *Cox Broadcasting* exception has no application to this case because the ruling below affirming an injunction does not threaten any *federal* policy. The trial court in this case enjoined a *state* law – Amendment 2 – in

---

[3] *See, e.g., National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (immediate review allowed where state court enjoins Nazi's march that may be protected by First Amendment); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 n.1 (1971) (immediate appeal allowed where state court temporarily enjoins circulation of leaflets because temporary injunction has "marked impact on petitioners' First Amendment rights"); *see also Southland Corp. v. Keating*, 465 U.S. 1, 7-8 (1984); *Local No. 438 Construction & General Laborers' Union v. Curry*, 371 U.S. 542 (1963).

order to protect *federal* constitutional rights. The state supreme court affirmed this injunction of state law.

The state does not contend that there is a federal interest in enforcing Amendment 2 that must be protected by immediate review. The injunction may erode the *state's* interest in enforcing Amendment 2, but that interest is committed by long-standing principles of federalism to the care and sound discretion of the state judiciary, not to the oversight of the United States Supreme Court. *Cf. Murdock v. Memphis*, 20 Wall. 590 (1875) (noting that state courts are traditionally committed with authority over state law).

None of the cases cited by the state involves an instance in which this Court, in order to protect a purely state interest, granted immediate review of a state court decision affirming a state trial court's preliminary injunction of state law. In *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), for instance, this Court granted immediate review of an Illinois court's issuance of a temporary injunction enjoining the state from distributing leaflets protesting alleged efforts to induce white residents to sell their property in a particular neighborhood. Unlike the instant case, in *Keefe* there was no "indication that the injunction rests on a disputed question of fact that might be resolved differently upon further hearing." 402 U.S. at 418 n.1. The Court noted that "the temporary injunction here, which has been in effect for over three years, has already had marked impact on the petitioners' First Amendment rights." *Id.*

Because the Illinois court in *Keefe* enjoined activities protected by the First Amendment to the U.S. Constitution, the state court's injunction eroded the federal right of free speech. By contrast, the interim ruling here affirming a state court injunction does not impinge upon a federal right. There is, therefore, no need for immediate review by this court. Assuming *arguendo* that the Colorado Supreme Court erred and construed the federal right in question too broadly, this Court can correct any such error by the normal method – by reviewing a final judgment on the merits of *all* of the plaintiffs' federal claims.

The other two cases cited by the state involving interlocutory review of preliminary injunctions are less relevant than *Keefe*. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), involved a federal district court's injunction of state law; *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985), involved a federal district court's preliminary injunction of a federal statute on constitutional grounds. Neither case sheds any light on this Court's jurisdiction to review *state courts'* preliminary injunctions. The concerns of federalism that underlie the finality doctrine when this Court reviews state court decisions under 28 U.S.C. § 1257 are inapplicable to injunctions issued by *federal* courts.[4] Therefore, instances of this Court's review

---

[4] *See Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945) (noting that finality doctrine "derives added force when the jurisdiction of this Court is invoked to upset the decision of a *State* court" because of considerations of federalism and comity) (emphasis added); Note, *The Finality Rule for Supreme Court Review of State Court Orders*, 91 Harv. L Rev. 1004, 1012-13 (1978) ("One manifestation of these federalism concerns is the notion

of preliminary injunctions issued by federal courts say little about the compelling requirements of finality under 28 U.S.C. § 1257(a).

Cases dealing with this Court's review of federal courts' preliminary injunction orders are not relevant to review under 28 U.S.C. § 1257 because this Court's jurisdiction to review lower federal courts is governed by different statutory provisions. Unlike 28 U.S.C. § 1257, the statutes controlling jurisdiction to review lower federal courts' rulings explicitly allow U.S. Circuit Courts of Appeals and thus the U.S. Supreme Court to review grants of preliminary injunctions by federal district courts. *See* 28 U.S.C. § 1292(a)(1). Indeed, this Court's jurisdiction over lower federal courts is not limited by any finality requirement at all, unlike its jurisdiction over state courts. *See* 28 U.S.C. § 1254 (authorizing Supreme Court review of decisions by U.S. Courts of Appeals "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, *before or after rendition of judgment or decree*") (emphasis added).

Thus, this Court's decisions construing statutes that explicitly allow review of interlocutory orders provide no guidance on the meaning of 28 U.S.C. § 1257, which contains an explicit finality requirement. For instance, *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305

---

that the Court, in deciding whether to hear an appeal brought under section 1257, should exhibit a heightened solicitude for the integrity of the trial process because of possible state sensitivity about interlocutory supervision by the federal judiciary.").

(1985) – cited by the state – involved this Court's construction of 28 U.S.C. § 1252, a statute (now repealed) that explicitly provided this Court with jurisdiction to review *"an interlocutory or final judgment . . .* of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action . . . to which the United States . . . is a party." (emphasis added) Not surprisingly, the *Walters* Court found that this statute provided it with jurisdiction over an interlocutory appeal of a federal district court's preliminary injunction. It is difficult to see what relevance *Walters* has to the construction of 28 U.S.C. § 1257, which, unlike 28 U.S.C. §§ 1254 and 1252, contains an explicit finality requirement and no authorization to review state court interlocutory judgments.

The state does not offer any reason for granting immediate review except that it would like to avoid "the public cost of [additional proceedings]," which, it complains, "is enormous and wholly unwarranted." Cert. Petition at 19 n.16. This assertion is irrelevant to finality. The state has no right to immediate interlocutory appeal to escape the costs of litigation. Such costs are the burden that every litigant is expected to bear. Moreover, in this case, the trial has commenced and will be completed within the next week. Accordingly, most of the costs feared by the state will have been incurred by the time this Court disposes of the state's petition for certiorari review.

II. THE COLORADO SUPREME COURT'S INTERIM RULING IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND DOES NOT PRESENT AN ISSUE OF SUCH IMPORTANCE THAT IT REQUIRES THIS COURT'S UNPRECEDENTED INTERFERENCE WITH THE ONGOING STATE COURT PROCEEDINGS.

A. The Colorado Supreme Court's interim ruling is consistent with this Court's precedents.

In its interim ruling, the Colorado Supreme Court determined that Amendment 2 interfered with the right of gay men, lesbians, and bisexuals to participate equally in the political processes "because it bars [this group] from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation." *Evans*, 854 P.2d at 1285. The Colorado court preliminarily determined that:

> Amendment 2 alters the political processes so that a targeted class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of a majority of the electorate through the adoption of a constitutional amendment. Rather than attempting to withdraw anti-discrimination issues as a whole from state and local control, Amendment 2 singles out one form of discrimination and removes its redress from consideration by the normal political processes.

Id.

The Colorado Supreme Court found that Amendment 2 implicated rights guaranteed by the equal protection clause of the Fourteenth Amendment because the equal protection clause bars states from creating unequal burdens on independently identifiable groups with respect to the right to participate in the political processes, absent a compelling state interest. The Colorado Supreme Court described this fundamental principle as the "common thread which unites" three lines of cases that have addressed the paramount importance of effective political participation in our system of government: the reapportionment cases,[5] cases concerning minority party rights,[6] and cases involving direct restrictions on the right to vote.[7]

In these three lines of cases, this Court established that the right to vote in state elections, although mentioned nowhere in the constitution, is nonetheless a fundamental federal right. *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964); *Kramer v. Union Free School District*, 395 U.S. 621 (1969). The right to vote is a fundamental right, this Court explained in *Reynolds*, because it is the single means by which most people are able to participate in the process of representative government. Inequalities in voting are suspect because they deny some citizens any

---

[5] *See, e.g., Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

[6] *See, e.g., Williams v. Rhodes*, 393 U.S. 23 (1968).

[7] *See, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

effective voice in enacting policies that substantively affect their lives. *Kramer*, 395 U.S. 621. The state's contention that all three lines of cases concern not a fundamental right to participate but a fundamental "right to vote" (pet. 9-11) ignore this Court's explanation of the reason why there is a fundamental right to vote in state elections. Voting is not a core value in itself; it is, however, a vital tool in the process by which this nation achieves a core constitutional goal – self-government – through elected representatives. *Reynolds*, 377 U.S. at 561, 565.

This Court's opinion in *Hunter v. Erickson*, 393 U.S. 385 (1969), makes clear that the fundamental right to participate equally in self-government goes beyond the right to vote. *Hunter* involved a local charter amendment that, like Amendment 2, repealed existing nondiscrimination laws and forbade the enactment of new ones except by direct popular vote.[8] This Court found the *Hunter* amendment unconstitutional after applying strict scrutiny because it made passage of nondiscrimination laws that would benefit racial, ethnic and religious minorities more difficult than passage of any other city ordinance. 393 U.S. at 391.

But race was not the only issue that this Court addressed in *Hunter*. The Court noted that "the State may

---

[8] Unlike the charter amendment in *Hunter*, Amendment 2 does not permit the enactment of civil rights laws at any level, even by popular vote. The repeal of Amendment 2 by a state-wide vote would permit enactment by all the usual means. In this sense, Amendment 2 makes a state-wide constitutional amendment a necessary prerequisite to the passage at any level of Colorado government of civil rights laws that protect lesbians and gay men.

no more disadvantage *any* particular group by making it more difficult to enact legislation in its behalf than it may dilute *any* person's vote or give *any* group a smaller representation than another of comparable size." *Hunter*, 393 U.S. at 393 (emphasis added). Twice the Court explained that the amendment in *Hunter* was constitutionally offensive because it disadvantaged one particular group by making it more difficult for its members to participate in the political process. 393 U.S. at 391, 392-393. In one instance, this Court referred to the amendment before it as a denial of the right to vote on an equal basis; and, in the other, the Court equated procedures that make it more difficult to enact protective legislation with dilution of voting power. *Hunter*, 393 U.S. at 391, 392-393. In both instances, the Court cited *Reynolds v. Sims*, 377 U.S. 533 (1964) and *Avery v. Midland County*, 390 U.S. 474 (1968), two voting rights malapportionment cases that did not involve suspect classifications but rather classifications that discriminated against urban residents and in favor of rural residents. *Id.*; *see* Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 Harv. L. Rev. 1905, 1917 (1993) (explaining similarity between city charter amendment addressed in *Hunter* and constitutional amendments like Amendment 2).

Although, as the Colorado Supreme Court recognized, *Hunter* speaks clearly to the constitutionality of Amendment 2, the state urges that *Hunter* is simply about "suspect classifications." Pet. at 5-9. If this were the case, however, it would have been pointless for the *Hunter* court to discuss why participation in the political processes is a fundamental right – it simply could have

applied heightened judicial scrutiny based upon a suspect classification analysis.

In addition to ignoring much of the *Hunter* opinion, the state's argument reads too much into this Court's decision in *James v. Valtierra*, 402 U.S. 137 (1971). *James* did not say that *only* those mandatory referenda that affected "suspect classes" were subject to close review. In *Gordon v. Lance*, 403 U.S. 1 (1973), decided six weeks later, the Court held that a mandatory referendum requirement for bonded indebtedness did not deprive the plaintiffs of a fundamental right. In reaching this conclusion, the Court cited and distinguished *Hunter* by noting that it could "discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing. Consequently, no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote." *Gordon*, 403 U.S. at 5. Because the mandatory referendum provisions did not "discriminate against *or authorize discrimination against* any identifiable class, they do not violate the Equal Protection Clause." *Gordon*, 403 U.S. at 7 (emphasis added).

Gordon demonstrates that *Hunter*'s outcome did not depend exclusively on racial classifications and that the state voting rights cases did not depend on literal denials of the right to cast a ballot. If the only value protected by the fundamental right to vote in state elections was the ability to cast a ballot on an equal basis with other citizens, then the analysis of *Hunter* and *Gordon* ought to have ignored the state voting rights cases entirely

because the laws at issue in *Gordon* and *Hunter* did not deny the franchise to anyone. Likewise, if mandatory referenda were suspect only when they disadvantaged "suspect classes," the *Gordon* Court would have cited *Hunter* for that proposition and disposed of the case summarily because the referendum in *Gordon* did not involve a suspect classification. Instead, *Gordon* found that the mandatory referendum requirement was constitutional because it did not "fence out" *any* independently identifiable group from the political process.

There is no dispute in this case that Amendment 2 singles out an identifiable group – gay men, lesbians, and bisexuals. *See* Note, *Anti-Gay-Rights Initiatives*, 106 Harv. L. Rev. at 1918 n. 107 (gay men and lesbians constitute an independently identifiable group). Indeed, the terms of Amendment 2 explicitly target this group as the object of the amendment's restrictions. Moreover, there is no doubt that lesbian, gay, and bisexual persons are identifiable independent from the controversy surrounding Amendment 2 or the laws and policies it prohibits. The state's argument now being presented at trial assumes that gay, lesbian, and bisexual persons constitute an identifiable "interest group" united by persistent common interests.[9]

It was on this Court's careful explanations of its rationales in the apportionment cases as well as in *Hunter* and *Gordon* that the Colorado Supreme Court based its

---

[9] By contrast, the *Gordon* Court noted that all persons who happened to support bonded indebtedness in different situations had nothing in common apart from their opposition to mandatory referendum requirements for debt of the kind at issue in *Gordon*.

ruling in this case. Because Amendment 2 prevents lesbians, gay men, and bisexuals alone among Coloradans from appealing to legislators and policymakers at any level of state or local government for antidiscrimination legislation, it places, as *Hunter* put it, "special burdens" on their ability to participate in the "governmental process." Amendment 2 is aimed at disadvantaging lesbians, gay men, and bisexuals at every level of Colorado government.[10]

B. The Colorado Supreme Court did not rule that classifications based on sexual orientation are suspect and thus did not contradict any federal circuit court rulings.

As articulated above, the Colorado Supreme Court's interim ruling preliminarily tells the state that it must justify Amendment 2 with a compelling state interest because the amendment implicates *fundamental* constitutional rights. Contrary to the state's allegations, pet. at 11-13, the interim ruling does not rely on the argument that classifications based on sexual orientation are suspect. Indeed, at the very outset of its ruling, the Colorado Supreme Court cites cases holding that gay men, lesbians,

---

[10] Petitioners continually suggest that Amendment 2 affects only the power of local government to pass anti-discrimination legislation, and, that like the amendment in *Hunter*, it simply imposes a mandatory referendum. But Amendment 2 destroys the power of Colorado government at any level to pass anti-discrimination legislation. And again, it makes no provision for an override by popular vote, local or state. A statewide vote *amending the state constitution* is a prerequisite to enactment or enforcement of any legislation.

and bisexuals have not been found to constitute a suspect class, and properly states that such precedents – which its decision does not contradict – do not "render the Equal Protection Clause inapplicable to [these groups]." *Evans*, 854 P.2d at 1275. Because this issue was not raised or considered by the court in the interim ruling below, there is no conflict with federal appellate decisions and thus no reason for this Court to review that interlocutory decision.

C. The decision below does not interfere with the interest of the state in enacting appropriate legislation.

The state contends that the interim ruling of the Colorado Supreme Court will "create widespread uncertainty" and improperly "inject the judiciary into matters reserved for the state legislature."[11] Pet. at 13. The state bases that contention on its assumption that the Colorado Supreme Court's interim ruling invalidates all state regulations that preempt local laws or that allocate costs and benefits among groups.

The state's contention is groundless. The state ignores the Colorado Supreme Court's careful delineation of the rights at issue. As a general matter, the simple passage or repeal of legislation does not implicate the fundamental right described in *Hunter* unless simple passage or repeal poses irrational or discriminatory barrier

---

[11] The interim ruling of the Colorado Supreme Court *preserves* the power of state and local legislative bodies to act as fora for the enactment of civil rights legislation.

to the political participation of an independently identifiable group. Thus, the interim ruling of the Colorado Supreme Court poses no threat to democratic government.

CONCLUSION

Because the decision appealed from is not a final judgment of a state court, this Court lacks jurisdiction to consider the Writ. As the trial in this matter is currently on-going, this Court should decline to take the extraordinary action of interfering with on-going state court proceedings to review a non-final order that merely preserved the status quo pending full resolution of all of the legal issues in the case. Moreover, the decision below does not conflict with precedents of this Court or of federal circuit courts.

Dated this 18th day of October, 1993.

Respectfully submitted,

JEAN E. DUBOFSKY, P.C.

JEAN E. DUBOFSKY*
1881 Ninth Street, Suite 210
Boulder, CO 80302
(303) 447-3510

JEANNE WINER
Attorney at Law
1942 Broadway, Suite 404
Boulder, CO 80302
(303) 938-6836

GREGORY A. EURICH
HOLLAND & HART
555 17th Street, Suite 2900
P.O. Box 8479
Denver, CO 80201
(303) 295-8166

DAVID H. MILLER
American Civil Liberties
Union of Colorado
400 Corona Street
Denver, CO 80218
(303) 777-5482

MATTHEW A. COLES
WILLIAM B. RUBENSTEIN
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800, Ext. 545

CLYDE J. WADSWORTH
WILSON, SONSINI, GOODRICH & ROSATI
2 Palo Alto Square
Palo Alto, CA 94306
(415) 493-9300

SUZANNE B. GOLDBERG
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
666 Broadway
New York, NY 10012
(212) 995-8585

CITY AND COUNTY OF DENVER
CITY ATTORNEY
DARLENE M. EBERT
Assistant City Attorney
1445 Cleveland Pl., Room 303
Denver, CO 80202-5375
(303) 640-2931

BOULDER CITY ATTORNEY
JOSEPH N. DE RAISMES, III
JANE W. GREENFIELD
P.O. Box 791
Boulder, CO 80306
(303) 441-3020

*Counsel of Record

Attorneys for Respondents

Supreme Court, U.S.
FILED
OCT 20 1993
OFFICE OF THE CLERK

No. 93-453

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

v.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

REPLY BRIEF OF PETITIONERS

GALE A. NORTON *
Attorney General of Colorado

TIMOTHY M. TYMKOVICH
Solicitor General

JOHN DANIEL DAILEY
Deputy Attorney General

PAUL FARLEY
Deputy Attorney General

COLORADO DEPARTMENT OF LAW
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
(303) 866-4500

REX E. LEE
Special Assistant
Attorney General
2480 Iroquois Drive
Provo, Utah 84604
(801) 373-3342

Attorneys for the Petitioners

* Counsel of Record

October 20, 1993

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

CASES

	Page
Bernal v. *Fainter*, 467 U.S. 216 (1984)	3
Burson v. *Freeman*, 112 S. Ct. 1846 (1992)	3
Construction & Gen. Laborers' Local 438 v. *Curry*, 371 U.S. 542 (1963)	2
Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975)	2
Hunter v. *Erickson*, 393 U.S. 385 (1969)	5-6
James v. *Valtierra*, 402 U.S. 137 (1971)	6
Mills v. *Alabama*, 384 U.S. 214 (1966)	2
Organization for a Better Austin v. *Keefe*, 402 U.S. 415 (1971)	6
Pope v. *Atlantic Coast Line R.R.*, 345 U.S. 379 (1953)	2
Washington v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982)	6

CONSTITUTIONAL PROVISION

U.S. Const. amend. X	5

STATUTE

28 U.S.C. § 1257	1, 2, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-453

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

v.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

REPLY BRIEF OF PETITIONERS

I. THE DECISION BELOW IS "FINAL" WITHIN THE MEANING OF 28 U.S.C. § 1257.

Respondents primarily argue that the Colorado Supreme Court's decision regarding the existence of a fundamental right of "any identifiable group" to be free from statewide regulation and the application of strict scrutiny to Amendment 2 is not "final" for purposes of 28 U.S.C. § 1257. To the contrary, the Colorado Supreme Court's decision is final because it completely resolved the federal issues which are the subject of the petition for certiorari, in a manner that as a practical matter all but assures

that Amendment 2 will be found unconstitutional and will never be enforceable.

As Respondents concede, "this Court may consider a state court decision to be final for purposes of [28 U.S.C. §] 1257 even though further proceedings are anticipated in the lower state courts." Opp. 7. This is so for state court decisions in which "the federal issue is conclusive or the outcome of further proceedings preordained" and thus "the case is for all practical purposes concluded." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 479 (1975); see *Mills* v. *Alabama*, 384 U.S. 214, 217-18 (1966); *Construction & Gen. Laborers' Local 438* v. *Curry*, 371 U.S. 542, 550-51 (1963); *Pope* v. *Atlantic Coast Line R.R.*, 345 U.S. 379, 382 (1953).

This characterization of finality applies precisely to the Colorado Supreme Court's decision resolving the federal issues that underlie the petition for certiorari. Respondents attempt to avoid this conclusion only by arguing that the state decision was an "interim ruling simply affirm[ing] an injunction that preserved the status quo pending a full trial on the merits of the plaintiffs' claims." Opp. 6. This is not so. Undertaking *de novo* review of the Fourteenth Amendment issues before it, see Pet. App. A-7 to A-8 ("the question we review is strictly a question of law" "subject to *de novo* review on appeal"), the Colorado Supreme Court finally resolved both that Amendment 2 implicates a fundamental right and that Amendment 2 is subject to "strict scrutiny" under the Equal Protection Clause, which is likely fatal. Pet. App. A-29 to A-31.

Respondents have, in fact, adopted precisely this position in proceedings on remand. They have argued—as they must—that the Colorado Supreme Court's decision conclusively establishes a fundamental right and that strict scrutiny applies to Amendment 2.[1]

---

[1] Respondents observe that the State has not conceded in the trial court that it cannot prevail under the "compelling state in-

Especially for equal protection claims, a conclusion that strict scrutiny applies effectively concludes the underlying claim. "[S]trict scrutiny is strict in theory but usually fatal in fact." *Bernal* v. *Fainter*, 467 U.S. 216, 219 n.6 (1984) (internal quotation omitted); see Pet. 18. Respondents assert that *Burson* v. *Freeman*, 112 S. Ct. 1846 (1992), is contrary to this well-established proposition. It is not. *Burson* and the cases it cites establish that States have, for purposes of First Amendment analysis, certain compelling interests in regulating the voting process. But *Burson confirmed* that a finding that strict scrutiny applies in all but the exceptional case is a conclusive determination. This Court "readily acknowledge[d] that a law rarely survives such [strict] scrutiny" and "reaffirm[ed] that it is the rare case in which we have held that a law survives strict scrutiny." *Id.* at 1852, 1857.

The Colorado Supreme Court's decision is just as "final" as the order of an Illinois Appellate Court that this Court reviewed in *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971). In *Keefe*, this Court granted certiorari from an intermediate appellate court decision upholding a temporary injunction, and did so despite the certainty of further trial court proceedings. Review was appropriate because "nothing in the record . . . would indicate that the Illinois courts applied a less rigorous standard in issuing and sustaining th[e] injunction than they would with any permanent injunction in the case" and the state court's conclusion relied upon no "disputed question of fact." *Id.* at 418 n.*. In this case, the Colorado Supreme Court's holdings regarding the existence of a fundamental right and the applicability of strict scrutiny were purely legal determinations, and they

---

terest" standard. That argument is disingenuous. The State's position on that issue was adopted only after the trial court insisted on holding a trial on the remaining issues—a course of action to which Petitioners strenuously objected.

would apply as well to review of a permanent injunction. To be sure, the holding is "law of the case" and will control all future proceedings unless the Colorado Supreme Court were to overrule itself, an unlikely event.

Indeed, *Keefe* presents a closer case than does this one. Justice Harlan dissented in *Keefe* because the Illinois *Supreme* Court had not yet passed upon the legal reasoning at issue and would, after remand, have an opportunity to review the intermediate court's legal determination. *Id.* at 421-22 (Harlan, J., dissenting). Here, of course, the Colorado Supreme Court has issued the State's final determination regarding the federal issue, and review may be had only in this Court.

Respondents urge the Court to deny certiorari to avoid "piecemeal" litigation of federal issues. Opp. 8. But the other grounds asserted by Respondents raise insubstantial constitutional issues: the Colorado Supreme Court acknowledged that Respondents' suspect class argument has been rejected by all courts (Pet. App. A-8 to A-9), and there is no serious doubt that Amendment 2 satisfies rational relationship review. Respondents also advert to vague First Amendment challenges that the state supreme court did not even address in entering the orders under review, and Respondents make no effort to demonstrate how those issues could possibly justify enjoining Amendment 2. In sum, the only federal issue that stands as an obstacle to the enforcement of Amendment 2 is the "fundamental rights" challenge upheld by the state supreme court. Thus, review of that decision now will permit the State's constitutional amendment to be implemented, and review now is the only way to permit that amendment to go into effect.

Moreover, Respondents attempt to distinguish *Keefe*, and to argue against review generally, on the ground that the Colorado Supreme Court's decision implicates no federal interest. Opp. 13-14. Again, that is not so. Respondents separately acknowledge that "self-government"

is "a core constitutional goal." Opp. 19. The Colorado Supreme Court's decision interferes with that federal constitutional interest directly as well as more broadly. "Self-government" of course includes passage and enforcement of measures such as Amendment 2. Cf. U.S. Const. amend. X. Failure to review the decision will have a significant chilling effect on the willingness of individuals and groups both within and without Colorado to undertake measures similar to Amendment 2. Those citizens will thereby lose their right to petition government either through the referendum process or by lobbying their legislatures. What makes the injury particularly acute is that cycles for pursuing such measures have finite cut-off dates that will soon pass. Thus, the injury cannot be remedied except by this Court granting review now and resolving the federal constitutional issue finally resolved by the Colorado Supreme Court in this case. This provides a particularly compelling reason for the Court to conclude that the order is "final" within the meaning of Section 1257.

II. THE "FUNDAMENTAL RIGHTS" HOLDING OF THE COURT BELOW WARRANTS REVIEW BY THIS COURT.

There is no merit to Respondents' half-hearted suggestion that this case fails to present a conflict with decisions of this and other courts or to present issues of exceptional importance meriting review. Indeed, Respondents City of Aspen and City Council of Aspen do not even offer these arguments.

A. Respondents argue that the Colorado Supreme Court's decision is consistent with the line of this Court's cases commencing with *Hunter* v. *Erickson*, 393 U.S. 385 (1969). This would be so only if the Court in those cases joined the Colorado Supreme Court in holding that the Equal Protection Clause protects "any identifiable group" from being subject to differential, statewide regulation. However, that claim is precisely the one that this

Court has already disavowed in *James* v. *Valtierra*, 402 U.S. 137 (1971), and *Washington* v. *Seattle School Dist. No. 1*, 458 U.S. 457 (1982).

In *James* v. *Valtierra*, this Court could not have been plainer in holding that *Hunter*'s equal protection holding was limited to measures that embodied "distinctions based on race." 402 U.S. at 141 (internal quotation omitted). Because the challenged measure before the Court involved no suspect class, "[t]he present case could be affirmed only by extending *Hunter*, and this we decline to do." *Id.* Any other result would produce an absurdly broad prohibition upon state measures designed to secure uniform regulation: "of course a law-making procedure that 'disadvantages' a particular group does not always deny equal protection," and the Equal Protection Clause could not be read to limit referenda that targeted particular groups "because they would always disadvantage some group." *Id.* at 142.

In *Washington* v. *Seattle School Dist. No. 1*, 458 U.S. 457 (1982), this Court reaffirmed that limitation upon *Hunter*. It held that "the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action," but it is only "when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decision-making process" that a different analysis is required. *Id.* at 470 (emphasis in original).

The conflict between this Court's decisions and the holding below is therefore plain. Indeed, it is hard to imagine how the issue could be framed any more clearly than it has been by the court below, and therefore certiorari is particularly justified.

B. Respondents also suggest that the Colorado Supreme Court's decision neither conflicts with the uniform decisions of the United States Courts of Appeals—which

hold that sexual orientation does not define a "suspect class" triggering strict scrutiny—nor establishes a wide-ranging principle that impedes uniform, statewide regulations. Opp. 23-25. Respondents' arguments are not only without merit, but are contradictory.

Respondents claim that the Colorado Supreme Court's decision has no wide-ranging effect because "the careful delineation of rights at issue" is limited to "the political participation of an independently identifiable group." Opp. 24-25. The state court decision is conceivably limited only if the "group" is "identifi[ed]" in precisely the manner required by suspect class analysis. Otherwise, any "independently identifiable group"—*e.g.*, doctors, farmers, persons with certain taxable income, or persons committing particular criminal acts—would all be able to benefit from the Colorado Supreme Court's decision by invoking the Equal Protection Clause to secure particular protections. Review is warranted because the Colorado Supreme Court has adopted a dangerously open-ended principle that threatens to impede enforcement of a wide variety of routine state constitutional provisions and legislation. See also Pet. 13-17.

If, in fact, "independently identifiable group[s]" are those that seek "the enactment of civil rights legislation" (Opp. 24 n.11), then Respondents have simply confirmed that the Colorado Supreme Court's protection of "gay men, lesbians, and bisexuals" (Opp. Question Presented) conflicts with decisions of federal courts of appeals. Respondents do not dispute that those federal courts have uniformly declined to extend "suspect class" or "strict scrutiny" protection based upon sexual orientation. See Pet. 11-13. Although the Colorado Supreme Court has not invoked the magic words of "suspect class," it has adopted indistinguishable reasoning and protections that accompany a finding that a measure is directed at a suspect class. Review by this Court is further warranted on this basis.

CONCLUSION

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

GALE A. NORTON *
Attorney General of Colorado

TIMOTHY M. TYMKOVICH
Solicitor General

JOHN DANIEL DAILEY
Deputy Attorney General

PAUL FARLEY
Deputy Attorney General

COLORADO DEPARTMENT OF LAW
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
(303) 866-4500

REX E. LEE
Special Assistant
Attorney General
2480 Iroquois Drive
Provo, Utah 84604
(801) 373-3342

Attorneys for the Petitioners

* Counsel of Record

October 20, 1993

No. 93-453

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,
Petitioners,
vs.
RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE & BRIEF AMICUS CURIAE OF COLORADO FOR FAMILY VALUES
in support of the *Petitioners*

Robert K. Skolrood
Counsel of Record
Barry C. Hodge, Esquire
The National Legal Foundation
6477 College Park Square
Suite 306
Virginia Beach, VA 23464
(804) 424-4242
Attorneys for Amicus Curiae

BEST AVAILABLE COPY

No. 93-453

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,
Petitioners,
vs.
RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF COLORADO FOR FAMILY VALUES
in support of the *Petitioners*

Robert K. Skolrood
Counsel of Record
Barry C. Hodge, Esquire
The National Legal Foundation
6477 College Park Square
Suite 306
Virginia Beach, VA 23464
(804) 424-4242
Attorneys for Amicus Curiae

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF COLORADO FOR FAMILY VALUES
in support of the *Petitioners*

Colorado for Family Values (CFV), by its attorney, Robert K. Skolrood, of the National Legal Foundation, moves this court pursuant to Rule 21.2(b) of the Supreme Court of the United States for leave to file a brief amicus curiae in the aforementioned action in order to present arguments stating why the petitioners' request should be granted.

The reason for requesting this action is based on Rule 10.1(c) of the Supreme Court of the United States. CFV spent thousands of dollars and numerous hours in obtaining the passage of the Colorado Constitutional Amendment at issue. It is in a unique position to illustrate the gravity of the Colorado Supreme Court's decision and its national significance.

The following parties, represented by counsel, have refused to consent to the filing of the attached brief amicus curiae:

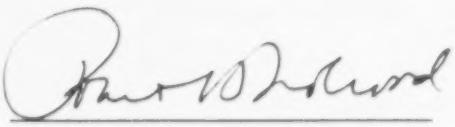
Jean E. Dubofsky, Lead Counsel
Representing: Richard G. Evans, Angela Romero, Linda Fowler, Paul Brown, Jane Doe, Martina Navratilova, Priscilla Inkpen, John Miller, and Boulder Valley School District RE-2.
Refused Consent.

Edward M. Caswall, Esquire
Representing: the City of Aspen and the City Council of Aspen.
Refused Consent.

Joseph N. DeRaismes, III, City Attorney
Representing: the City of Boulder.
Refused Consent.

Darlene M. Ebert, Assistant City Attorney
Representing: the City and County of Denver.
Refused Consent.

The petitioners have consented to the filing of this brief amicus curiae.



Robert K. Skolrood
Attorney for Amicus Curiae

The National Legal Foundation
6477 College Park Square
Suite 306
Virginia Beach, VA 23464
(804) 424-4242

No. 93-453

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,
Petitioners,
vs.
RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF AMICUS CURIAE OF COLORADO FOR FAMILY VALUES
in support of the *Petitioners*

Robert K. Skolrood
Counsel of Record
Barry C. Hodge, Esquire
The National Legal Foundation
6477 College Park Square
Suite 306
Virginia Beach, VA 23464
(804) 424-4242
Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS vii

TABLE OF AUTHORITIES ..... viii-xii

INTEREST OF AMICUS CURIAE 1

ARGUMENT

I. The Colorado Supreme Court Usurped Federal Judicial Power 2

II. The Colorado Supreme Court Violated The Standards Authoritatively Imposed By This Court For The Recognition Of A Fundamental Right 5

A. The Fundamental Rights Cases Relied Upon By The Court Below Are Irrelevant To This Case 6

B. The Court Below Extended The *Hunter* Doctrine Beyond Suspect Classification In Contravention Of This Court's Explicit Instructions 7

C. The Decision Of The Colordo Supreme Court Paralyzes The Sovereignty Of The People Of The State Of Colorado 10

III. This Fundamental Right To Participate Equally In The Political Process Will Render Suspect Every Legitimate Limitation Upon The Power Of The Legislature 12

IV. The Judgment Of The Colordo Supreme Court Is Final 16

V. Conclusion 18

TABLE OF AUTHORITIES

Cases ..... **Page(s)**

American Federation of Labor v. Reilly,
155 P.2d 145 (Colo. 1944) 4

American Radio Ass'n, AFL-CIO v. Mobile Steamship Ass'n,
419 U.S. 215 (1974) 16

Arthur v. City of Toledo, Ohio,
782 F.2d 565 (6th Cir. 1986) 9, 11

Bowen v. Gilliard,
483 U.S. 587 (1987) 14

Bowers v. Hardwick,
478 U.S. 186 (1986) 4, 5, 10

Construction & Gen. Laborers' Union, Local 438 v. Curry,
371 U.S. 542 (1963) 17

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975) 16

Dunn v. Blumstein,
405 U.S. 330 (1972) 6, 13

Eastlake v. Forest City Enter., Inc.,
426 U.S. 668 (1976) 11

Evans v. Romer,
854 P.2d 1270 (Colo. 1993) 5, 6, 7, 9, 12, 14

Flores v. Pierce,
617 F.2d 1386 (9th Cir. 1980),
cert. denied, 449 U.S. 875 (1980)..... 9

Gordon v. Lance,
403 U.S. 1 (1971)..... 7, 8, 9, 11, 13, 14, 15

Habron v. Epstein,
412 F.Supp. 256 (D.Md. 1976),
aff'd, 429 U.S. 802 (1976)..... 9

Harper v. Virginia Bd. of Elections,
383 U.S. 663 (1966)..... 6

High Tech Gays v.
Defense Indus. Sec. Clearance Office,
895 F.2d 563 (9th Cir. 1990),
reh'g denied, 909 F.2d 375 (1990)..... 15, 16

Hunter v. Erickson,
393 U.S. 385 (1969)..... 7, 8, 9, 10, 11, 12, 14

James v. Valtierra,
402 U.S. 137 (1971)..... 7, 8, 9, 11, 12, 13

Jefferson v. Hackney,
406 U.S. 535 (1972)..... 13

Kramer v. Union Free School. Dist. No. 15,
395 U.S. 621 (1969)..... 6

Lucas v.
Forty-Fourth Gen. Assembly of Colo.,
377 U.S. 713 (1964)..... 6

Martin v. Hunter's Lessee,
14 U.S. (1 Wheat.) 304 (1816)..... 2, 3

McKee v. City of Louisville,
616 P.2d 969 (Colo. 1980)..... 11

Mills v. State of Alabama,
384 U.S. 214 (1966)..... 17

Minnesota v. Clover Leaf Creamery Co.,
449 U.S. 456 (1981)..... 4

Mobile v. Bolden,
446 U.S. 55 (1980)..... 11, 13

National Gay Task Force v.
Board of Educ.,
729 F.2d 1270 (10th Cir. 1984),
aff'd, 470 U.S. 903 (1985)..... 16

North Carolina v. Butler,
441 U.S. 369 (1979)..... 4

Oregon v. Hass,
420 U.S. 714 (1975)..... 4

Organization for a Better Austin v. Keefe,
402 U.S. 415 (1971)..... 17, 18

Parker v. Mandell,
344 F.Supp. 1068 (D.Md. 1972)..... 9, 14

Pennekamp v. Florida,
328 U.S. 331 (1946)..... 3

People v. Berger,
521 P.2d 1244 (Colo. 1974)..... 4

People v. Western Union Tel. Co.,
198 P. 146 (Colo. 1921)..... 3

Pope v. Atlantic Coast Line Railroad Co.,
345 U.S. 379 (1953) 17, 18

Radio Station WOW, Inc. v. Johnson,
326 U.S. 120 (1945)..... 16

Reynolds v. Sims,
377 U.S. 533 (1964)..... 6

San Antonio Ind. School Dist. v. Rodriguez,
411 U.S. 1 (1973)..... 5, 6, 11

Smith v. Farr,
104 P. 401 (Colo. 1909)..... 4

Steffan v. Cheney,
780 F.Supp 1 (D.D.C. 1991)..... 15, 16

Washington v. Seattle School District,
458 U.S. 457 (1982)..... 7, 8, 9, 11

Wesberry v. Sanders,
376 U.S. 1 (1964)..... 6

Whitcomb v. Chavis,
403 U.S. 124 (1971)..... 13

Wilcox v. People,
104 P. 408 (Colo. 1909)..... 4

Williams v. Rhodes,
393 U.S. 23 (1968)..... 6

Woodward v. United States,
871 F.2d 1068 (Fed. Cir. 1989),
cert. denied, 494 U.S. 1003 (1990)..... 15

Wuebker v. James,
58 N.Y.S.2d 671 (Schenectady County Ct. 1944)..... 4

CONSTITUTIONS AND STATUTES..... Page(s)

U.S. CONST. art. III, § 1..... 2

U.S. CONST. art. III, § 2, cl. 2..... 3

U.S. CONST. art. VI, cl. 2..... 2

U.S. CONST. art. VI, cl. 3..... 3

28 U.S.C. § 1257(a)..... 17

COLO. CONST. art. II, § 1..... 10

COLO. CONST. art. II, § 2..... 10

COLO. CONST. art. II, § 30b..... 5, 11, 18

COLO. CONST. art. V, § 1..... 11

COLO. CONST. art. XII, § 8..... 3

COLO. REV. STAT. ANN. § 24-12-101 (West 1988)..... 3

COLO. REV. STAT. ANN. § 24-12-102 (West 1988)..... 3

INTEREST OF AMICUS

Colorado for Family Values (CFV) is the grassroots organization which secured the passage of Amendment 2. Since CFV gathered approximately 85,000 signatures, spent thousands of dollars, and invested hundreds of hours educating the public about Amendment 2, it is interested in the continued vitality of the Amendment. CFV continues to educate the public concerning special rights.

CFV desires to maintain the integrity of our constitutional government, namely the sovereignty of the people. States have plenary power enabling them to pass a wide variety of laws impacting citizens. CFV is interested in protecting the rights of the citizens of Colorado who have expressed their will in Amendment 2.

The National Legal Foundation assisted in drafting Amendment 2 and participated as amicus curiae in this litigation at the state court level. The Foundation has participated as amicus curiae in several federal and state cases and has served as lead counsel in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990).

Counsel of record for amicus curiae is Robert K. Skolrood. He is licensed to practice in Illinois, Oklahoma, Virginia, the District of Columbia, the United States Supreme Court, as well as numerous U.S. Circuit Courts of Appeal and District Courts.

I. The Colorado Supreme Court Usurped Federal Judicial Power

The judicial power of the United States is vested in this Court:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. CONST. art. III, § 1.

State judges are bound by the U.S. Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

Since *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), it has been established that state courts do not have federal judicial power but rather have only a duty to apply the federal constitution:

> It is obvious that this obligation is imperative upon the state judges in their official, and not merely in their private, capacities. From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment . . . .
>
> . . . .
>
> . . . In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the constitution; and if they should unintentionally *transcend their authority*, or misconstrue the constitution, there is no more reason for giving their judgments an absolute and irresistible

> force than for giving it to the acts of the other co-ordinate departments of state sovereignty.

Martin, 14 U.S. at 340, 344 (emphasis added).[1]

The justices of the Colorado Supreme Court are required to take an oath or affirmation by the U.S. Constitution,[2] and by taking this oath or affirmation,[3] they acknowledge their duty to apply the federal constitution. Even the court below has recognized this duty.[4] The Colorado Supreme Court justices have no federal judicial power and thus do not have the final say on issues concerning the federal constitution.[5] They have only a duty to apply that constitution.

Out of this duty arises an obligation to obey authoritative decisions of this Court:

> [W]hen a state court reviews state legislation challenged as violative of the Fourteenth Amendment, it is not free

---

1 *See also*, *Martin*, 14 U.S. at 338-42.

2 "The . . . judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ." U.S. CONST. art. VI, cl. 3.

3 COLO. CONST. art. XII, § 8, COLO. REV. STAT. ANN. § 24-12-101 and § 24 12-102 (West 1988) provide that a Colorado state judge shall either swear or affirm that he will "support the constitution of the United States and of the state of Colorado . . . ."

4 *See People v. Western Union Tel. Co.*, 198 P. 146 (Colo. 1921) (in deciding whether a state trial court judge could declare a state statute in violation of the federal constitution (in light of the fact that Colorado had a constitution provision that allowed only the state supreme court to resolve such issues) the court, relying both on Article VI, clause 2 of the U.S. Constitution and on a state judge's oath, stated: "The answer is that the trial judge was bound by the mandate of the federal Constitution to *apply that instrument* upon all proper occasions and to hold it to be the supreme law of the land . . . ."). *Western Union Tel. Co.*, 198 P. at 148 (emphasis added).

5 U.S. CONST. art. III, § 2, cl. 2 (appellate jurisdiction of the U.S. Supreme Court). *See Pennekamp v. Florida*, 328 U.S. 331, 335 (1946) (stating that the Constitution had imposed upon it the final authority to determine the meaning and application of the "words of that instrument" in contexts requiring the resolution of judicial issues and that when the highest court of a state had reached a decision on such an issue the Court would give respectful attention "to its reasoning and conclusion" but that its authority was not final).

> to impose greater restrictions as a matter of federal constitutional law than this Court has imposed.

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461 n.6 (1981) (citation omitted).[6]

The Colorado Supreme Court has acknowledged this obligation[7] and other state appellate courts have as well.[8]

Despite this duty and its attendant obligation, the Colorado Supreme Court ignored its lack of federal judicial power and recognized a novel fundamental right not based in the language of the Constitution and one which has never been recognized by this Court. The court below did so in the face of a sovereign act of the people of the State of Colorado. The means by which this was done has set a dangerous precedent. The judges of the Colorado Supreme Court should be reminded of Justice White's warning in *Bowers v. Hardwick*, 478 U.S. 186 (1986), regarding the discovery of new fundamental rights:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.

---

6 *See also, Oregon v. Hass*, 420 U.S. 714, 719 (1975); *North Carolina v. Butler*, 441 U.S. 369, 376 (1979).

7 *See American Federation of Labor v. Reilly*, 155 P.2d 145, 148 (Colo. 1944) (Even the Colorado Supreme Court itself acknowledges that "[t]he Supreme Court of the United State is the final arbiter in the field of Federal constitutional law and its decisions as to the meaning and scope of a constitutional provision bind state judges." In *Reilly*, before deciding whether a state trial judge had properly held that a state statute was repugnant to the federal constitution, the court announced: "In reaching its decision on the points now in consideration the trial court *properly relied* upon the pronouncements of the highest tribunal in our nation, which we think sustain the conclusion reached." *Id.*) (citations omitted) (emphasis added). *See also, People v. Berger*, 521 P.2d 1244, 1245 (Colo. 1974); *Wilcox v. People*, 104 P. 408, 409 (Colo. 1909); *Smith v. Farr*, 104 P. 401, 403 (Colo. 1909).

8 *Wuebker v. James*, 58 N.Y.S.2d 671, 677 (Schenectady County Ct. 1944) ("When decisions of the United States Supreme Court are based on a line of judicial precedents which have been accepted as correctly applying constitutional provisions on a subject, they are *entitled to serious consideration and respect* . . . .") (emphasis added).

Id. at 194.

II. The Colorado Supreme Court Violated The Standards Authoritatively Imposed By This Court For The Recognition Of A Fundamental Right

The issue before the court below was whether Amendment 2[9] violated an *existing* constitutional right:

> [W]e independently review the question of whether Amendment 2 has been shown to violate an *existing* constitutional right.

Evans v. Romer, 854 P.2d 1270, 1275 (Colo. 1993) (emphasis added).

According to this Court, the standard used to determine whether a right is fundamental is set forth in *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" . . . lies in assessing whether there is a right to education *explicitly or implicitly guaranteed by the Constitution*.

Id. at 33 (emphasis added).

In *Rodriguez*, this Court refused to recognize education as a fundamental right because it failed to meet this standard.

---

9 Amendment 2 provides in pertinent part: "Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination." COLO. CONST. art. II, § 30b.

A. The Fundamental Rights Cases Relied Upon By The Court Below Are Irrelevant To This Case

The court below failed to conduct a textual and historical analysis of the Equal Protection Clause of the Fourteenth Amendment as required by *Rodriguez*. Rather it based its decision exclusively upon case "decisions [which] addressed entirely distinct questions and constitutional problems from those presented here." *Evans*, 854 P.2d at 1278. This lack of textual, historical, and authoritative case analysis makes clear that the court below has attempted to create, by fiat, the previously unrecognized "fundamental right to participate equally in the political process."

While the court below does cite fundamental rights cases[10] as authority, the cited cases have been held by this Court to demonstrate only "that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). Simply put, the court below cites as support United States Supreme Court cases which recognize only that the right to vote and cast a ballot is constitutionally protected. The court below recognized the narrowness of the voting rights cases and concedes their inapplicability:

> The "precondition," reapportionment, and "candidate eligibility" cases are not dispositive of, or directly controlling on, our decision here, as Amendment 2 falls within none of those three categories of cases. Admittedly, those decisions addressed entirely distinct questions and constitutional problems from those presented here.

Evans, 854 P.2d at 1278.

---

10 Reapportionment cases, *see, e.g., Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); cases concerning minority party rights, *see, e.g., Williams v. Rhodes*, 393 U.S. 23 (1968); cases involving direct restrictions on the exercise of the franchise, *see, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

B. The Court Below Extended The Hunter Doctrine Beyond Suspect Classification In Contravention Of This Court's Explicit Instructions

Aside from the previously mentioned non-dispositive fundamental rights cases, the court below based its holding primarily on *Hunter v. Erickson*, 393 U.S. 385 (1969), and its progeny.[11] Although the facts of *Hunter* and its offspring resemble the present controversy, those decisions were specifically decided with reference to suspect classifications, they in no way concern the fundamental rights strand of equal protection, and their principles cannot be extended beyond suspect classification.[12]

In *Hunter*, this Court struck down a voter enacted charter amendment preventing the city of Akron from "implementing any ordinance dealing with race, religion, or ancestral discrimination in housing without the approval of the majority of the voters of Akron." *Hunter*, 393 U.S. at 386. This Court defined the aim of the Fourteenth Amendment:

> Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are "constitutionally suspect" and subject to the "most rigid scrutiny." They bear a far heavier burden of justification than other classifications.

Id. at 391-92 (citations omitted).

In *James v. Valtierra*, 402 U.S. 137 (1971), this Court upheld Article XXXIV of the California Constitution which prohibited the development of low-income housing projects unless approved by a majority of the voters of the state. The lower court in *James* did exactly what the court below has done in this case: both courts improperly extended the

---

11 *Washington v. Seattle School Dist.*, 458 U.S. 457 (1982); *James v. Valtierra*, 402 U.S. 137 (1971); *Gordon v. Lance*, 403 U.S. 1 (1971).

12 The court below admits "[t]hat gay men, lesbians, and bisexuals have not been found to constitute a suspect class," nor do plaintiffs contend that they qualify as such. *Evans*, 854 P.2d at 1275.

principles of *Hunter* to include non-suspect classifications.[13] This Court reversed the decision and tersely restricted application of the *Hunter* doctrine to suspect classification, saying:

> The court below erred in relying on Hunter to invalidate Article XXXIV. Unlike the case before us, Hunter rested on the conclusion that Akron's referendum law denied equal protection by placing "special burdens on *racial minorities* within the governmental process . . . .
>
> . . . .
>
> *The present case could be affirmed only by extending Hunter, and this we decline to do.*

James, 402 U.S. at 140-41 (emphasis added).

Again, in *Gordon v. Lance*, 403 U.S. 1 (1971), this Court upheld a West Virginia state constitutional provision requiring approval of sixty percent of the voters in a referendum election before the state's subdivisions could incur bonded indebtedness. This Court clearly distinguished *Hunter*, explaining that its principles applied only to suspect classes:

> Unlike the restrictions in [*Hunter*], the West Virginia Constitution singles out no "discrete and insular minority" for special treatment . . . . We are not, therefore, presented with a case like Hunter v Erickson . . . .

Id. at 5.

The only United States Supreme Court case cited by the court below which has actually applied the *Hunter* doctrine is *Washington v. Seattle School Dist.*, 458 U.S. 457 (1982). In *Washington*, this Court struck

---

13 The basis of plaintiffs claim in *James* was *identical* to the Colorado Supreme Court's reasoning here. The *James*' plaintiffs "suggest[ed] that the mandatory nature of the Article XXXIV referendum constitute[d] unconstitutional discrimination because it hamper[ed] persons desiring public housing from achieving their objective when no such roadblock face[ed] other groups seeking to influence other public decisions to their advantage." *James*, 402 U.S. at 142.

down Initiative 350 which in effect limited the ability of the state to utilize forced busing to achieve racial integration. This Court stated that "[g]iven the *racial* focus of Initiative 350, this suffices to trigger application of the Hunter doctrine." *Id.* at 474 (emphasis in original).

Explaining the nature of *Hunter*, this Court stated:

> Hunter . . . rested on a principle that has been vital for over a century -- that "the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on *race*."

Washington, 458 U.S. at 486 (emphasis added).

Surprisingly, the court below held that "the principle articulated in [*Hunter* and *Washington*] clearly is not one that can logically be limited to the 'race' context alone." *Evans*, 854 P.2d at 1281.[14] This blatant abuse of the *Hunter* doctrine usurps federal judicial power by ignoring clear precedent in derogation of the lower court's duty.

Aside from this abuse of power, the court below failed to explain how even an extended *Hunter* doctrine supports the existence of any fundamental right. No authoritative support for such a contention can be found. The words "fundamental right" are not mentioned once in *Hunter*, *James*, *Gordon*, or *Washington*, and the court below cites no authority in which any other court has interpreted these cases as supporting a fundamental right.[15]

---

14 The Colorado Supreme Court defines the *Hunter* principle as one of neutrality. Neutrality, however, cannot be divorced from suspect classifications. *Washington* defines non-neutrality stating: "[T]he state allocates governmental power non-neutrally, by explicitly using the *racial* nature of a decision to determine the decision making process." 458 U.S. at 470 (emphasis in original).

15 Quite to the contrary, the courts have consistently cited *Hunter* as a suspect classification case. *See, e.g., Flores v. Pierce*, 617 F.2d 1386 (9th Cir. 1980), *cert. denied*, 449 U.S. 875 (1980); *Arthur v. City of Toledo, Ohio*, 782 F.2d 565 (6th Cir. 1986); *Habron v. Epstein*, 412 F.Supp. 256 (D.Md. 1976), *aff'd*, 429 U.S. 802 (1976); *Parker v. Mandel*, 344 F.Supp. 1068 (D.Md. 1972).

Furthermore, it is illogical to use an extended *Hunter* doctrine to support the existence of a fundamental right. If the principles of *Hunter* really do apply to sexual orientation, strict scrutiny would then be triggered upon that basis alone, and the finding of a fundamental right would be unnecessary. Yet the court below went on to insist that an extended *Hunter* doctrine established a fundamental right: the right of identifiable groups to participate equally in the political process.[16]

The Colorado Supreme Court failed to heed the warning of this Court in *Bowers* that a court is "most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers*, 478 U.S. at 194. The illegitimate act of the court below was not without its price, and the people of the State of Colorado have borne the cost of this judicial inventiveness.

C. The Decision Of The Colorado Supreme Court Paralyzes The Sovereignty Of The People Of The State Of Colorado

> All political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

COLO. CONST, art. II, § 1.[17]

The right of the people to enact legislation through the initiative process is, in the words of the Colorado Supreme Court, a right "of the first order; it is not a grant to the people but a reservation by them for

---

16 The only explanation for this illogical conclusion is that perhaps the Colorado Supreme Court realized that extension of the *Hunter* doctrine would, in effect, create a third strand of equal protection analysis if it were not somehow "stuffed" into an existing strand of equal protection. Since the Court refuses to admit that it is a suspect class case, the only other basis upon which to employ strict scrutiny is by finding a fundamental right.

17 *See also*, COLO. CONST. art. II, § 2 ("The people of this state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided, such change be not repugnant to the constitution of the United States.").

themselves." *McKee v. City of Louisville*, 616 P.2d 969, 972 (Colo. 1980) (citation omitted).[18] "Like the right to vote, the power of initiative is a fundamental right at the very core of our republican form of government." *Id.* (citation omitted).

This Court has acknowledged the paramount importance of the sovereignty of the people. "The referendum . . . is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies." *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 673 (1976). Although they are subject to the limitations of the federal constitution, "[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." *James*, 402 U.S. 137, 141 (1971). Accordingly, the "Court will not lightly set aside the results of voter referendums." *Arthur v. City of Toledo, Ohio*, 782 F.2d 565, 573 (6th Cir. 1986).[19]

The court below, however, "lightly set aside" the results of the voter initiative Amendment 2 by ignoring *Rodriguez*. This Court has forbidden such actions which "discard these fixed principles in favor of a judicial inventiveness that would go 'far toward making this Court a superlegislature.'" *Mobile v. Bolden*, 446 U.S. 55, 76 (1980). As a result, the sovereignty of the people of the State of Colorado has been crippled and their right to limit or control their state government has been paralyzed.

As this Court noted in *Gordon*, 403 U.S. 1 (1971), *James*, 402 U.S. 137 (1971), and *Washington*, 458 U.S. 457 (1982), application of the *Hunter* doctrine must be limited to suspect classes alone, not only because *Hunter* is based exclusively upon suspect classification, but also because there is no other limitation which would prevent the courts from

---

18 COLO. CONST. art. V, § 1 ("The first power hereby reserved by the people is the initiative . . . .).

19 In *Arthur*, the Sixth Circuit Court of Appeals refused to strike down a referendum which plaintiffs claimed had violated the Equal Protection Clause.

granting this right to all "of the diverse and shifting groups that make up the American people." *James*, 402 U.S. at 142.

III. This Fundamental Right To Participate Equally In The Political Process Will Render Suspect Every Legitimate Limitation Upon The Power Of The Legislature

According to the Colorado Supreme Court, "Amendment 2 singles out and prohibits this class of persons [homosexuals, lesbians, and bisexuals] from *seeking governmental action favorable* to it and thus, from participating equally in the political process." *Evans*, 854 P.2d at 1285 (footnote omitted) (emphasis added).

Seeking favorable governmental action is an extraordinarily widespread practice. The political landscape of America is littered with interest groups whose very existence is predicated upon obtaining legislation favorable to the group of persons which they represent. If "any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny," *Evans*, 854 P.2d at 1282 (footnote omitted), then all limitations upon legislative power which burden an identifiable group's ability to obtain favorable legislation would be suspect.

Failure to review now the decision of the court below will lend weight to an already dangerous precedent. A state could be forced to eliminate numerous "barriers" to the enactment of legislation regardless of how legitimate the limitation may be.

This Court expressed this same concern in *James* where the plaintiffs had relied upon *Hunter*.[20] This Court responded by stating:

---

20 Plaintiffs in *James* asserted the same argument which has been set forth by the plaintiffs in this case. The *James*' plaintiffs "suggest[ed] that the mandatory nature of the Article XXXIV referendum constitut[ed] unconstitutional discrimination because it hamper[ed] persons desiring public housing from achieving their objective when no such roadblock face[d] other groups seeking to influence other public decisions to their advantage." *James*, 402 U.S. at 142.

> [A] lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. Under any such holding . . . . [T]his Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to "disadvantage" any of the diverse and shifting groups that make up the American people.

James, 402 U.S. at 142.

Likewise, in *Gordon*, 403 U.S. 1, this Court refused to extend *Hunter* beyond suspect classification and upheld a West Virginia Constitutional provision which limited the ability of the state's subdivisions to incur bonded indebtedness. This Court noted the fact that "[t]he constitutions of *many* States prohibit or severely limit the power of the legislature . . . ." *Id.* at 6 (emphasis added). Such matters are *"more properly left to the determination by the States and the people than to the courts operating under the broad mandate of the Fourteenth Amendment." Id.* (emphasis added).

The decision of the Colorado Supreme Court sets a dangerous precedent that is unlimited in its applicability.[21] The scope of the decision is

---

21 This Court has expressed this same fear in other cases as well. *See Jefferson v. Hackney*, 406 U.S. 535, 548-49 (1972) (citing *James*, this Court stated: "The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the . . . classes, however lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment."); *Whitcomb v. Chavis*, 403 U.S. 124, 156-57 (1971) (where this Court refused to recognize the "fundamental right" to equal group representation and stated: "[Such a] holding . . . is not easily contained. It is expressive of the more general proposition that any group with distinctive interests must be represented in legislative halls . . . . This approach would make it difficult to reject claims of Democrats, Republicans, or members of any political organization . . . . At the very least, [such a holding] would spawn endless litigation concerning the multi-member district systems now widely employed in this country."); *Mobile v. Bolden*, 446 U.S. 55, 77 (1980) (where this Court refused to recognize the "fundamental right" to participate equally in the political process, citing *Whitcomb*, 408 U.S. 124, and *Dunn*, 405 U.S. 330, and stated: "But this right to equal participation in the political process does not protect any 'political group' from

incredibly broad because the term "identifiable class" is virtually unrestricted and includes all groups organized on the basis of behavior. In contrast, suspect classification previously provided a logical, "bright line" limitation on the *Hunter* doctrine.[22]

The court below, perhaps recognizing the dangerous potential of its own decision, made a futile attempt to limit[23] the scope of its holding. The lower court attempted to restrict the definition of "independently identifiable class" while still including homosexuals, lesbians and bisexuals. Without any elaboration, the Colorado Supreme Court simply found the limitation set forth in *Gordon*, 403 U.S. 1, "both controlling and persuasive here." *Evans*, 854 P.2d at 1284.

The limitation set forth in *Gordon*, however, cannot be understood apart from the contrasts and distinctions this Court was making.[24]

> Unlike the restrictions in our previous cases, the West Virginia Constitution singles out no "discrete and insular minority" for special treatment. We are not, therefore, presented with a case like Hunter v. Erickson . . . .
>
> The class singled out in Hunter was clear -- "those who would benefit from laws barring *racial, religious, or ancestral discriminations*." In contrast we can discern no independently identifiable group or category

---

electoral defeat."); *Parker v. Mandel*, 344 F.Supp. 1068, 1079 (D.Md. 1972) ("To hold that the strict scrutiny test applies to legislation of this sort would be to render automatically suspect every statutory classification made by state legislatures . . . .").

22 Suspect classification is *the* limitation because it is a definite standard; it is also a *logical* limitation because unequal and burdened participation in the political process is a factor which suspect classes must demonstrate to gain such status. *See, e.g., Bowen v. Gilliard*, 483 U.S. 587 (1987). Thus, the rights of those actually burdened remain protected.

23 Holding that a fundamental right is applicable only to certain groups is contrary to the very nature of a fundamental right. If the right is so "fundamental," certainly all should be entitled to its protection. This observation compels the court to recognize that *Hunter* is based on suspect classification as opposed to fundamental rights.

24 The opinion of the court below begins quoting *Gordon* in the middle of the paragraph at "In contrast . . . ," *Evans*, 854 P.2d at 1284, without indicating the contrast *Gordon* was attempting to make.

> that favors bonded indebtedness over other forms of financing.

Gordon, 403 U.S. at 5 (citations omitted) (emphasis added).

The distinction *Gordon* makes is between racial or ancestral groups on the one hand, and groups which are not organized on the basis of race or ancestry on the other. Hence, *Gordon* clearly limits the *Hunter* doctrine to suspect classification.[25]

Aside from this misplaced reliance upon *Gordon*, the court below set forth no limitations and no criteria for recognizing what constitutes an "independently identifiable group."[26] Extending application of the *Hunter* doctrine outside of suspect classification and including groups organized on the basis of behavior,[27] such as homosexuals, bisexuals,

---

25 Race and ancestry are the only two truly "suspect classes" recognized by this Court.

26 The only meaningful distinction which *Gordon*, 403 U.S. 1, makes is that of suspect classification. Certainly there are "groups or categories that [favor] bonded indebtedness over other forms of financing," *Id.* at 5, but the distinction which *Gordon* makes is that there are no "*suspect classes*" which favor bonded indebtedness over other forms of financing. Except for this line separating suspect classifications from non-suspect classifications, there is no standard set forth in *Gordon* which separates "independently identifiable groups" (groups entitled to the fundamental right to participate equally in the political process) from non-"independently identifiable groups," (those not entitled to the fundamental right). Even if, as the Colorado Supreme Court believes, *Gordon* does not restrict application of the *Hunter* doctrine to suspect classes, there is no other meaningful limitation which can be found in *Gordon*. If the distinction in *Gordon* was not drawn on the basis of "suspect class," the Court in *Gordon* merely held that in this particular situation they could find no "independently identifiable class." *Gordon* then holds only that there is no "independently identifiable group or category that favors bonded indebtedness over other forms of financing." *Gordon*, 403 U.S. at 5. That is an extremely limited holding which does not exclude other "shifting and diverse groups of the American population" from the definition of "independently identifiable group."

27 This Court has clearly held that sexual orientation "is primarily behavioral in nature." *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *See also, Steffan v. Cheney*, 780 F.Supp. 1 (D.D.C. 1991) and *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990), *reh'g denied*, 909 F.2d 375 (1990).

and lesbians "will provide the basis to attack a wide range of routine federal and state legislation."[28]

Homosexuals, bisexuals, and lesbians are groups which are, in a legal sense, organized on the same basis as any other political group. By pretending that gay men, lesbians, and bi-sexuals are a "so-called" "identifiable group" which can somehow be distinguished from other groups organized on the basis of behavior, the Colorado Court's decision grants, whether by design or inadvertence, suspect classification to "sexual orientation." This is contrary to *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990), *reh'g denied*, 909 F.2d 375 (1990).[29]

IV. The Judgment Of The Colorado Supreme Court Is Final

Since the early history of this Court, the Court's decisions have recognized certain exceptions to the final judgment rule of 28 U.S.C. §1257(a). *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 125 n.2 (1945). This Court's decision in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), categorized these exceptions. The first category encompassed cases in which the federal issue was "conclusive or the outcome of further proceedings preordained" although state proceedings, including entire trials, were yet to occur." *Id.* at 479.[30]

The case at hand is closely analogous to two particular U.S. Supreme Court category one cases.[31] In those comparable cases, this Court granted certiorari.

---

28 Petitioners Brief at 13.

29 *See also*, *Steffan v. Cheney*, 780 F.Supp. 1, 7 (D.D.C. 1991); *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984), *aff'd*, 470 U.S. 903 (1985).

30 Category two included cases in which the federal question(s) would survive subsequent state court proceedings regardless of the outcome and was premised upon the fact that no other federal issues would arise in such proceedings. *Cox Broadcasting Corp.*, 420 U.S. at 480. This category has been argued to be the original historical exception to the final judgment rule. *See Johnson*, 326 U.S. at 126-27.

31 For additional category one cases that are similar to the following two cases ,*see American Radio Ass'n, AFL-CIO v. Mobile Steamship Ass'n*, 419 U.S. 215 (1974)

In *Pope v. Atlantic Coast Line Railroad Co.*, 345 U.S. 379 (1953), a trial court, had sustained a general demurrer to the request for an injunction, but the Georgia Supreme Court reversed dismissing the petitioner's federal defense under a federal statute. The U.S. Supreme Court determined[32] that the state supreme court's judgment was final because the Georgia Supreme Court's decision, interpreting an important federal statute, was in conflict with U.S. Supreme Court decisions and the petitioner had no other defense. *Id.* at 381-82. These two reasons made the "federal question . . . the controlling question." *Id.* at 382.[33]

In *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), this Court held[34] that it had jurisdiction to hear the case even though a state appellate court had only affirmed the trial court's grant of a temporary injunction against leafleting and picketing. This Court stated that "[a]though the record in this case is not such as to leave the matter entirely free from doubt we conclude we are not without power to decide this case." *Id.* at 418 n.* (citations omitted). In light of that standard, it was crucial to the Court that the temporary injunction had been in effect for over three years holding the First Amendment rights of the petitioners hostage. *Id.*

---

and *Construction & Gen. Laborers' Union, Local 438 v. Curry*, 371 U.S. 542 (1963).

32 Only Justice Reed thought that the court's decision with regard to finality was wrong. *See Pope*, 345 U.S. at 387.

33 *See also, Mills v. State of Alabama*, 384 U.S. 214 (1966) (the trial court sustained demurrers to the complaint based on state and federal constitutional rights of free speech and press, but the state supreme court reversed despite that the petitioners had no other defenses and only Justice Harlan disagreed that the judgment was not final).

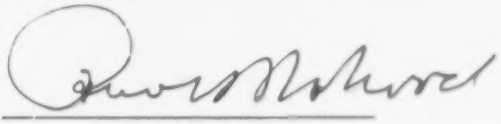
34 Although the decision was not unanimous, Justice Harlan's lone dissent was not based on the fact that the judgment was not final. Rather, Justice Harlan's dissent was based on the fact that the final judgment was not "rendered by the highest court of a State in which a decision could be had" as required by 28 U.S.C. § 1257. *See Keefe*, 402 U.S. at 420-23. Thus, on the issue of finality, this decision was unanimous.

Similarly, the court below decided an important federal question[35] and its decision is in conflict with U.S. Supreme Court decisions as in *Pope*. The petitioner-defendants have no other defense except to meet the burden of proving a compelling state interest. The judgment below is analogous to *Keefe* because there is no indication when the process of litigation regarding Amendment 2 will end. The preliminary injunction has already been in effect for over nine months,[36] and with the trial on the merits under way at the time of this writing and another state appeals process to come (regardless of the trial court's ruling), it is very probable that the injunction will be in effect for several years before a final decision is rendered. All the while, the sovereign power of the people of the State of Colorado is crippled.

V. Conclusion

The Colorado Supreme Court usurped federal judicial power in contravention of their duty, paralyzed the sovereignty of the people of the State of Colorado, and set a dangerous precedent that has no limits. The judgment is final.

Respectfully submitted this 22nd day of October, 1993.



Robert K. Skolrood
Attorney for Amicus Curiae

---

35 How state courts construe the Equal Protection Clause of the 14th Amendment is of great import.

36 The preliminary injunction was granted on January 15, 1993.